132-318

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~300.~~ 125

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS AND WASHINGTON LIBBY, PLAINTIFFS IN ERROR,

vs.

GEORGE S. RICHARDSON, CHARLES S. SMITH, GEORGE K. GUILD, RALPH L. CUTTER, AND HARRISON GARDNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 5, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 399.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS AND WASHINGTON LIBBY, PLAINTIFFS IN ERROR,

vs.

GEORGE S. RICHARDSON, CHARLES S. SMITH, GEORGE K. GUILD, RALPH L. CUTTER, AND HARRISON GARDNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 6, 1889.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before Hon. Walter Q. Gresham, circuit judge of the United States for the seventh judicial circuit, on Tuesday, the twentieth day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and tenth year.

WM. H. BRADLEY, *Clerk.*

George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner *vs.* James O. Cleveland, Cornelius B. Cummings, and Washington Libby, Survivors of Charles W. Woodruff, Deceased.	19193. Assumpsit.

Northern District of Illinois, *ss:*

Be it remembered that on the first day of September, 1884, came the plaintiffs, by their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their præcipe for a writ of summons, and also at the same time filed their bond for costs in said entitled cause; which said præcipe and bond are respectively in the words and figures following, to wit:

2 *Præcipe.*

United States of America, *Northern District of Illinois,* } *ss:*

Circuit Court, to October Term, A. D. 1884.

George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner, Copartners, *vs.* James O. Cleveland, Cornelius B. Cummings, Charles W. Woodruff, and Washington Libbey, Copartners.	Assumpsit.

The clerk of said court will issue a summons in the above-entitled cause against the said defendants in a plea of trespass on the case on promises, to the damage of the said plaintiffs of six thousand dollars, and direct the same to the marshal of said district, returnable to the October term of said court, A. D. 1884.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

Chicago, Aug. 26th, A. D. 1884.

Endorsed: Filed this first day of September, A. D. 1884. Wm. H. Bradley, clerk.

3 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

Circuit Court, to the October Term, A. D. 1884.

GEORGE C. RICHARDSON, CHARLES S. SMITH, RALPH L. CUTTER, and HARRISON GARDNER
vs. } In Assumpsit.
JAMES O. CLEVELAND, CORNELIUS B. CUMMINGS, CHARLES W. WOODRUFF, and WASHINGTON LIBBEY.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by the plaintiffs I hereby agree and stipulate that execution may issue against my property for any costs taxed against the plaintiffs.

Dated this twenty-sixth day of August, A. D. 1884.

ROBERT HILL.

Endorsed: Filed Sept. 1, A. D. 1884. Wm. H. Bradley, clerk.

On the same day, to wit, on the first day of September, 1884, came the plaintiffs, by their attorneys, and filed in said clerk's office their declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

4 Circuit Court of the United States for the Northern District of Illinois, to the October Term, A. D. 1884.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner, copartners doing business under the firm name and style of "George C. Richardson, Smith & Co.," who are citizens of the State of New York, plaintiffs in this suit, by Doolittle & McKey, their attorneys, complain of James O. Cleveland, Cornelius B. Cummings, Charles W. Woodruff, and Washington Libbey, copartners doing business under the firm name and style of "Cleveland, Cummings & Woodruff," who are citizens of the State of Illinois, defendants, who have been duly summoned to answer the plaintiffs in a plea of trespass on the case on promises.

For that whereas the said defendants heretofore, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and eighty-four, at New York, to wit, at said district, became and were indebted to the said plaintiffs in a large sum of money, to wit, the sum of six thousand dollars of lawful money, for divers

goods, wares, and merchandise by the said plaintiffs before that time sold and delivered to the said defendants and at the special instance and request of the said defendants; and, being so
5 indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay to the said plaintiffs the said sum of money last mentioned when the said defendants should be thereunto afterwards requested.

And whereas, also, afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandise of the said plaintiffs, the said defendants then and there undertook and faithfully promised the said plaintiffs that the said defendants would well and truly pay to the said plaintiffs so much money as the last-aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth, when the said defendants should be thereunto afterwards requested; and the said plaintiffs aver that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further large sum of money, to wit, the sum of six thousand dollars, of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, on the same day and year and at the place aforesaid, had notice.

6 And whereas also the said defendants afterwards, to wit, on the same day and year and at the place aforesaid, were indebted to the said plaintiffs in the further large sum of money, to wit, the sum of six thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiffs to the said defendants and at the like request of the said defendants; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendants and at the like request of the said defendants; and for other money by the said defendants before that time had and received to and for the use of the said plaintiffs; and for other money before that time and then due and owing the said plaintiffs for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiffs; and, being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested.

And whereas also the said defendants afterwards, to wit, on the same day and year and at the place aforesaid, accounted with
7 the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiffs and then and there being in arrear and

unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiffs in the further large sum of money, to wit, the sum of six thousand dollars, of like lawful money as aforesaid; and, being so found in arrear and indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants (although often requested, &c.) have not yet paid the several said sums of money above mentioned or any or either of them or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendants have hitherto altogether refused and still do refuse, to the damage of the said plaintiffs of six thousand dollars; and therefore the said plaintiffs bring suit, &c.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

8 *Copy of Account Sued on.*

Messrs. Cleaveland, Cummings & Woodruff to Geo. C. Richardson & Co., Dr., 115 Worth street, New York.

Note to your own order.
Return statement.

1883.					
Aug.	28	To mdse., 60, Sept. 15		333 94	
	29	" " "		853 79	
	"	" " "		156 06	
	30	" " "		859 35	
	"	" " "		4,783 65	
	"	" 4 mos., "		1,421 40	
Sep.	10	" " "	807 82 540 17		
				1,347 99	
	15	" 60 d.		227 17	
	"	" "		525 33	
	19	" "		324 74	
Oct.	24	" " Nov. 1		1,291 83	
				12,125 25	
		CR.			
Dec.	31	By cash		7,275 15	
					4,850 10

9 NEW YORK, *Aug.* 28, 1883.

Messrs. Cleaveland, Cummings & Woodruff bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 60, Sept. 15.
Remit in New York funds.

Triplicate.

Argyle K. [Bm] A. L.	# 1223 148-50	1 bls., Boott 3 " "	1027 3501	7⅜ 7⅜	------ ------	75 74 258 20
						333 94

10 NEW YORK, *Aug.* 29*th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff bought of George C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 60, Sept. 15.
Remit in New York funds.

Triplicate.

[B] R	6160-62	3 bls., Boott	4388	4¼	------	186 50
[BM] M	2592-2601	10 " "	10266	6½	------	667 29
						853 79

11 NEW YORK, *Aug.* 29*th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff, Chicago, Ills., bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 60, Sept. 15.
Remit in New York funds.

Triplicate.

(B) A	4388-90	3 bls., Boott	2401	6½	------	156 06

12 NEW YORK, *Aug.* 30*th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 60, Sep. 15.
Remit in New York funds.

Triplicate.

[SS] W	# 1583-95	13 bls., Boott	13480	6⅜	------	$859 35

13 NEW YORK, *Aug.* 30*th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff, Chicago, Ills., bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 60, Sep. 15.
Remit in New York funds.

Triplicate.

L. M. C. L L	2564–2613	50 bls , Lawrence------------	64057	$5\frac{3}{4}$	3.683 27
“ “	2714–28	15 “ I. “ ------------	19137	$5\frac{3}{4}$	1,100 38
					$4,783 65

14 NEW YORK, *Aug.* 30*th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 4 mos., Sep. 15.
Remit in New York funds.

Triplicate.

[E M] D D A	7590–5	6 c., Everett Denims--	6604	$12\frac{5}{8}$	Nett-	833 75
B D	641–2	2 “ “ “ --	2154	$10\frac{1}{4}$	“ -	220 79
[EM] C D	112–14	3 “ “ “ --	3261	$11\frac{1}{4}$	-----	366 86
						$1,421 40

15 NEW YORK, *Sep.* 10*th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 4 mos., Sep 15..
Remit in New York funds.

Triplicate.

(Y) D D	# 677–9	3 c. -------------------	2970	$12\frac{7}{8}$	------	382 39
“ D D N	193–4	2 “ -------------------	2004	$10\frac{3}{4}$	------	215 43
“ D D N	256–7	2 “ -------------------	2000	$10\frac{1}{2}$	------	210 00
						807 82

16 NEW YORK, *Sep. 10th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 4 mos., Sep. 15.
Remit in New York funds.

Triplicate.

(S R)	#					
W. P.	146–147	2 c., York	2072	8⅜	------	173 53
(X)						
T	840–3	4 " "	4018	9⅛	------	366 64
						540 17

17 NEW YORK, *Sept. 15th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 60 d.
Remit in New York funds.

Triplicate.

	#					
(Y)	459	1 c., York	1020	12¾	------	130 05
D D	95	1 " "	925	10½	------	97 12
" D D						
N						227 17

18 NEW YORK, *Sept. 15th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 60.
Remit in New York funds.

Triplicate.

(EM)	#					
DD	7439–40	2 c., Everett	2165	12¾	------	276 04
" CP	52	1 " "	1102	11¼	------	123 97
" DD	157	1 " "	1114	11¼	------	125 32
P						
						525 33

19 New York, *Sept.* 14*th*, 1883.

Messrs. Cleaveland, Cummings & Woodruff, Chicago, Ill., bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280.
Terms, 60, Sept. 15.
Remit in New York funds.

Triplicate.

Argyle.	# 4942–6	5 bls., Boott----------	5094	$6\frac{3}{8}$	------	324 74

20 New York, *Oct.* 24*th*, 1883.

Messrs. Cleveland, Cummings & Woodruff, Chicago, Ills., bought of Geo. C. Richardson & Co., Nos. 115 & 117 Worth St.

Post-office box 280
Terms, 60, Nov. 1.
Remit in New York funds.

Triplicate.

Argyle.	# 5487–5506	20 bls., Boott---------	20264	$6\frac{3}{8}$	------	1,291 83

21 *Plaintiffs' Affidavit of Amount Due.*

United States Circuit Court, to the October Term, A. D. 1884.

United States of America, } *ss:*
Northern District of Illinois,

George C. Richardson *et al.* }
v. } Assumpsit.
James O. Cleveland *et al.* }

United States of America, } *ss:*
Southern District of New York,

Ralph L. Cutter, one or the plaintiffs in the above-entitled cause, being duly sworn, says that the demand of the plaintiffs in the above-entitled cause is for the balance due for goods, wares, and merchandise sold and delivered by the plaintiffs to the defendants, as fully set out in the copy of account attached to the declaration in the above-entitled cause, and that there is due to the plaintiffs from the defendants, after allowing to the defendants all just credits, deductions, and set-offs, the sum of four thousand eight hundred and fifty and $\frac{10}{100}$ dollars.

RALPH L. CUTTER.

Subscribed and sworn to before me this 21 day of August, 1884.

[SEAL.] JOHN A. SHIELDS,

U. S. Commissioner, So. N. Y.

Endorsed: Filed Sept. 1, 1884. Wm. H. Bradley, clerk.

22 On the same day, to wit, on the first day of September, 1884, there issued out of said clerk's office a writ of summons in said entitled cause; which said writ, together with the return of the marshal thereto attached, *are* in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois,

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon James O. Cleveland, Cornelius B. Cummings, Charles W. Woodruff, and Washington Libbey, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner of a plea of trespass on the case upon promises, to their damage, as it is alleged, of six thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago
23 [SEAL.] aforesaid, this 1st day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 109th year.

WM. H. BRADLEY, *Clerk.*

Special Deputy's Return.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois,

Know all men by these presents that I have appointed and by these presents do appoint Geo. N. Jones my true and lawful deputy to execute the annexed writ — George C. Richardson *vs.* James O. Cleveland *et al.* and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]

U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit: By reading the same to and in the presence and the hearing of James O. Cleveland, therein named, on the 12th day of September, A. D.

1884. I did not serve the other defendants therein named, being unable to find them within my district.

A. M. JONES,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Geo. N. Jones, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was 24 actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 6th day of October, A. D. 1884.

[SEAL.] SAMUEL C. HAYES,
Notary Public.

Endorsed: Filed Oct. 6, A. D. 1884. Wm. H. Bradley, clerk.

25 Afterwards, to wit, on the fifteenth day of September, 1884, there was filed in said clerk's office a certified copy of the writ of summons in said entitled cause; which said certified copy, together with the return of the marshal endorsed thereon, are in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

The United States of America to the marshal of the southern district of Illinois, Greeting:

We command you to summon James O. Cleveland, Cornelius B. Cummings, Charles W. Woodruff, and Washington Libbey, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner of a plea of trespass on the case upon promises, to their damage, as it is alleged, of six thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 1st day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 109th year. 26 [SEAL.]

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the summons sued out of said court on the first day of September, A. D. 1884, in the cause wherein George C. Richardson *et al.* are the plaintiffs and James O. Cleveland *et al.* are the defendants.

In testimony whereof I have hereunto set my hand and affixed [SEAL.] the seal of said court, at my office, in Chicago, in said district, this 1st day of September, A. D. 1884.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

Executed this writ by reading the contents thereof to Cornelius B. Cummings, of Pekin, Tazewell Co., Illinois, this 9th day of September, A. D. 1884.

JOHN R. TANNER, *U. S. M.,*
By A. L. RIDER, *Dep.*

Endorsed: Filed Sept. 15, A. D. 1884. Wm. H. Bradley, clerk.

27 Afterwards, to wit, on the eighth day of October, 1884, came James O. Cleveland & Cornelius B. Cummings, two of the defendants, by their attorney, and filed in said clerk's office their pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois,

In the Circuit Court of the United States for the Northern District of Illinois, to the October Term, A. D. 1884.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, Charles Woodruff, and Washington Libbey, Copartners Doing Business under the Firm Name and Style of Cleaveland, Cummings and Woodruff,
ats. } Assumpsit.
GEORGE C. RICHARDSON, CHARLES S. SMITH, GEORGE K. Guild, Ralph L. Cutter, and Harrison Gardner, Copartners Doing Business under the Firm Name and Style of George C. Richardson, Smith & Co.

And the said defendants, James O. Cleaveland and Cornelius B. Cummings, impleaded, &c., with Charles W. Woodruff and Washington Libbey, by Melville W. Fuller, their attorney, come
28 and defend the wrong and injury, when, &c., and say that
they did not, together with their codefendants, Charles W.

Woodruff and Washington Libbey, undertake or promise in manner and form as the said plaintiffs have above thereof in their said declaration complained against them, the said James O. Cleaveland and Cornelius B. Cummings, impleaded, &c., and of this they, the said James O. Cleaveland and Cornelius B. Cummings, impleaded, &c., put themselves on the country, &c.

By M. W. FULLER, *Their Att'y.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, to the October Term, A. D. 1884.

GEORGE C. RICHARDSON, CHARLES S. SMITH, GEORGE K. Guild, Ralph L. Cutter, and Harrison Gardner, Copartners Doing Business under the Firm Name and Style of George C. Richardson, Smith & Co.,
vs.
JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, Charles W. Woodruff, and Washington Libbey, Copartners Doing Business under the Firm Name and Style of Cleaveland, Cummings & Woodruff.
} Assumpsit.

29 Cornelius B. Cummings, being duly sworn, deposes and says that he is one of the defendants in the above-entitled cause, and that he verily believes the said defendants have a good defense to said suit upon the merits to the whole of the said plaintiffs' demand.

CORNELIUS B. CUMMINGS.

Subscribed and sworn to before me this 6th day of October, A. D. 1884.

[SEAL.] JAMES M. JAMES,
Notary Public.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, to the October Term, A. D. 1884.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, Charles Woodruff, and Washington Libbey, Copartners Doing Business under the Firm Name and Style of Cleaveland, Cummings & Woodruff,
ats.
GEORGE C. RICHARDSON, CHARLES S. SMITH, GEORGE K. Guild, Ralph L. Cutter, and Harrison Gardner, Copartners Doing Business under the Firm Name and Style of George C. Richardson, Smith & Co.
} Assumpsit.

30 And the said defendants, James O. Cleaveland and Cornelius B. Cummings, impleaded, &c., with Charles W. Wood-

ruff and Washington Libbey, by Melville W. Fuller, their attorney, come and defend the wrong and injury when, &c., and pray judgment of the said writ, because they say that the said several supposed promises in the said plaintiffs' declaration mentioned were not made by the said defendants, impleaded with Charles W. Woodruff and Washington Libbey as copartners under the name of Cleaveland, Cummings & Woodruff, as therein alleged or otherwise; and the said defendants, impleaded, &c., deny that they, together with their codefendants, Charles W. Woodruff and Washington Libbey, were copartners under the name of Cleaveland, Cummings & Woodruff, as in said declaration is alleged, or otherwise; and this they, the said defendants, impleaded, &c., are ready to verify. Wherefore they pray judgment of the said writ, and that the same may be quashed.

By M. W. FULLER, *Their Att'y.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, to the October Term, A. D. 1884.

31 GEORGE C. RICHARDSON, CHARLES S. SMITH, George K. Guild, Ralph L. Cutter, and Harrison Gardner, Copartners Doing Business under the Firm Name and Style of George C. Richardson, Smith & Co.,

vs.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, Charles Woodruff, and Washington Libbey, Copartners Doing Business under the Firm Name and Style of Cleaveland, Cummings & Woodruff. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *Tazewell County,* } *ss:*

Cornelius B. Cummings, being first duly sworn, upon oath, according to law, deposes and says that he is one of the defendants in the above-entitled cause, and that the plea hereunto annexed is true in substance and in fact; and further deponent saith not.

CORNELIUS B. CUMMINGS.

Subscribed and sworn to before me, by the said Cornelius B. Cummings, this 6th day of October, A. D. 1884.

[SEAL.] JAMES M. JAMES, *Notary Public.*

32 UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, to the October Term, A. D. 1884.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, Charles Woodruff, and Washington Libbey, Copartners Doing Business under the Firm Name and Style of Cleaveland, Cummings & Woodruff,
ats.
GEORGE C. RICHARDSON, CHARLES S. SMITH, GEORGE K. Guild, Ralph L. Cutter, and Harrison Gardner, Copartners Doing Business under the Firm Name and Style of George C. Richardson, Smith & Co. } Assumpsit.

And the said defendants, James O. Cleaveland and Cornelius B. Cummings, impleaded, &c., with Charles W. Woodruff and Washington Libbey, by Melville W. Fuller, their attorney, come and defend the wrong and injury, when, &c., and pray judgment of the said writ, because they say that after the making of the said several supposed promises and undertakings in the said declaration mentioned, and before the commencement of this suit, at, to wit, the district aforesaid, to wit, on the 29th day of December, 1883, 33 the said plaintiffs, by their certain assignment in writing, signed by them under the firm name and style — George C. Richardson & Co. and now shown to the court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, did sell, assign, transfer, set over, and deliver unto one John J. Knickerbocker, his heirs, executors, administrators, and assigns, in consideration of the sum of seven thousand two hundred and seventy-five and $\frac{15}{100}$ dollars, lawful money, then and there by him, the said Knickerbocker, paid to said plaintiffs, the said several promises and undertakings in the said declaration mentioned and each and every of them which they, the said plaintiffs, then had or which they, the said plaintiffs, should, might, or could have against the said defendants, impleaded, &c., by reason of the happening of any matter or thing from the beginning of the world to the date last aforesaid, as by the said assignment or writing, reference being thereunto had, will fully appear; and this the said defendants, impleaded, &c., are ready to verify. Wherefore they pray judgment if the said plaintiffs ought to have and maintain their aforesaid action against them, &c.

And, for a further plea in this behalf, these defendants, James O. Cleaveland and Cornelius B. Cummings, impleaded, &c., with Charles W. Woodruff and Washington Libbey, say that the said plaintiffs ought not to have their aforesaid action against them, because 34 they say that after the making of the said several supposed promises and undertakings in the declaration mentioned and before the commencement of said suit, to wit, on the 29th day of December, 1883, the said defendants delivered to the said plaintiffs and the said plaintiffs accepted of them the sum of seven thousand two hundred and seventy-five and $\frac{15}{100}$ dollars in full satisfaction and discharge of the said several promises and undertakings, and of all the said sums of money in the said declaration mentioned, and which said sum of, to wit, seven thousand two hundred and seventy-five dollars and $\frac{15}{100}$, so paid as aforesaid, they, the said plaintiffs, then and there accepted and received of and from the said defendants in full satisfaction and discharge of the said several promises and undertakings, and of all the sums of money in the said declaration mentioned, and this the defendants, impleaded, &c., are ready to verify. Wherefore they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

By M. W. FULLER, *Their Att'y.*

Endorsed: Filed Oct. 8, 1884. Wm. H. Bradley, clerk.

35 Afterwards, to wit, on the twentieth day of October, 1884, there issued out of said clerk's office an *alias* writ of summons in said entitled cause; which said *alias* writ, together with the return of the marshal thereto attached, are in the words and figures following, to wit:

36 CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to the marshal of the northern district of Illinois, Greeting:

We again command you to summon James O. Cleveland, Cornelius B. Cummings, Charles W. Woodruff, and Washington Libbey, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December next, to answer unto George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner of a plea of trespass on the case upon promises, to their damage, as it is alleged, of six thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, [SEAL.] this 20th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 109th year.

WM. H. BRADLEY, *Clerk.*

[Endorsed:] Term No. —. Gen. No. —. Circuit Court of the United States, northern district of Illinois. —— —— *vs.* —— ——. Summons. Returnable — term, A. D. 188–. —— ——, clerk. Filed ——, A. D. 188–. —— ——, clerk. —— ——, attorney.

37 *Special Deputy's Return.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Know all men by these presents that I have appointed and by these presents do appoint Geo. N. Jones my true and lawful deputy to execute the annexed writ, Geo. C. Richardson *et al. vs.* Jas. O. Cleveland *et al.*, and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, by reading the same to and in the presence and the hearing of Charles W. Woodruff and Washington Libbey, therein named, on the 4th day of December, A. D. 1884.

I did not serve the other defendants therein named, being unable to find them within my district.

A. M. JONES,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

Marshal's fees:

— copies	
— miles	$ 20
2 services	4 00
Oath and certificate of service	
	$4 20

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Geo. N. Jones, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 5th day of December, A. D. 1884.

[SEAL.] SAMUEL C. HAYES,
Notary Public.

Endorsed: Filed Dec. 6, A. D. 1884. Wm. H. Bradley, clerk.

38 Afterwards, to wit, on the 4th day of December, 1884, came the plaintiffs, by their attorneys, and filed in said clerk's office the following paper, entitled or endorsed *similiter* to 1st plea, demurrer to 2d plea, replications to 3d and 4th pleas of Cleveland and Cummings, and stipulation to reply double, which are in words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

GEORGE C. RICHARDSON *et al.* *vs.* JAMES O. CLEAVELAND *et al.*	Assumpsit. Gen. No. 19193. Term No. 712.

And the plaintiffs as to the plea of the defendants, James O. Cleaveland and Cornelius B. Cummings, by them first above pleaded, whereby they have put themselves upon the country, do the like.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

39 And the plaintiffs, as to the pleas of the defendants, James O. Cleaveland and Cornelius B. Cummings, by them secondly above pleaded, say that the said plea and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to quash the said writ, and that the plaintiffs are not bound in law to answer the same, and this they are ready to verify; therefore, for want of a sufficient plea in this behalf, the plaintiffs pray judgment, and that the said defendants, Cleaveland and Cummings, may answer further to the said declaration, etc.

And the plaintiffs state and show to the court here the following causes of demurrer to said plea—that is to say, that—

First. Said plea does not give the plaintiffs a better writ.

Second. Said plea concludes with a verification, whereas it should conclude to the country.

And also that the said plea is in other respects uncertain in form and insufficient.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

40 And the plaintiffs, as to the plea of the said defendants, Cleaveland and Cummings, by them thirdly above pleaded, say that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that they, the plaintiffs, did not on, to wit, the twenty-ninth day of December, A. D. 1883, or at any other time, sell, assign, transfer, set over, or deliver unto one John J. Knickerbocker, his heirs, executors, administrators, or assigns, or to any other person or persons, the said several promises or undertakings in the said declaration mentioned, or any of them, which they, the said plaintiffs, then had or which they, the said plaintiffs, should, might, or could have against the said defendants, impleaded, etc., by reason of the happening of any matter or thing from the beginning of the world to the date last aforesaid, in manner and form as the said defendants have in their said plea alleged; and this the plaintiffs pray may be inquired of by the country, etc.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

41 And the plaintiffs, as to the plea of the defendants, Cleaveland and Cummings, by them thirdly above pleaded, say, by leave of the court first had and obtained, that the plaintiffs, by reason of anything in that plea alleged, ought not be *be* barred from having their aforesaid action, because they say that on and prior to, to wit, the said twenty-ninth day of December, A. D. 1883, the defendants became and were indebted to the plaintiffs on liquidated demands in a large sum of money, to wit, the sum of twelve thousand one hundred and twenty-five and $\frac{25}{100}$ dollars, for goods, wares, and merchandise before that time sold and delivered to the defendants by the plaintiffs at the special instance and request of the defendants, and upon divers other promises and undertakings before that time made and entered into by the defendants to and with the plaintiffs; that on or about the day last aforesaid the defendants requested the plaintiffs to accept from them, the defendants, a less sum than was then and there actually due the plaintiffs, to wit, to accept from the defendants the sum of sixty cents on each dollar of said indebtedness, in full satisfaction and discharge of the said indebtedness; that the plaintiffs did then and there receive and accept the sum of money in said plea alleged, to wit, the sum of seven thousand two hundred and seventy-five and $\frac{15}{100}$
42 dollars, being the sum of sixty cents on each dollar of the indebtedness aforesaid, and leaving then and there and still unpaid the sum of forty cents on each dollar, to wit, the sum of, to wit, four thousand eight hundred and fifty and $\frac{10}{100}$ dollars on said indebtedness, for which sum last aforesaid the plaintiffs bring their aforesaid action.

And the plaintiffs aver that in pursuance of said supposed compromise and at the request of the defendants and merely as a mode of carrying said supposed compromise into effect and as part of the same transaction they assigned their said claims to the said John J. Knickerbocker, who was then and there and is still the agent and attorney of said defendants, and who then and there as such attorney and agent paid the sum of money in said plea mentioned to the plaintiff, being sixty cents on the dollar of the indebtedness aforesaid, for and on behalf of the defendants and with the money of the defendants, and took and held such assignment solely on behalf of and only for the use of the defendants and not for his own use or for the use of any other person or persons soever except the defendants.

43 And the plaintiffs aver that said supposed satisfaction, discharge, and compromise and each of them and said alleged assignment was and were made without any good or valuable consideration as to the said sum of, to wit, four thousand eight hundred fifty and $\frac{10}{100}$ (\$4,850.10) dollars, and this the plaintiffs are ready to verify. Wherefore they pray judgment, etc.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

44 And the plaintiffs, as to the plea of the said defendants, Cleaveland and Cummings, by them thirdly above pleaded,

say, by leave of the court first had and obtained, that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that on and prior to, to wit, the twenty-ninth day of December, A. D. 1883, the defendants at, to wit, the district aforesaid, became and were indebted to the plaintiffs on liquidated demands in a large sum of money, to wit, the sum of twelve thousand one hundred and twenty-five and $\frac{25}{100}$ dollars, for divers goods, wares, and merchandise by the plaintiffs before that time sold and delivered to the defendants at the special instance and request of the defendants, and upon divers other promises and undertakings before that time made and entered into by the defendants to and with the plaintiffs for the balance due, upon which said indebtedness the plaintiffs bring their aforesaid action; that on and prior to, to wit, the said twenty-ninth day of December, A. D. 1883, at, to wit, the district aforesaid, the defendants represented to the plaintiffs that they, the defendants,
45 were and had been for a long time next previous thereto insolvent, and then and there, being indebted to the plaintiffs in a large sum of money, to wit, the sum of twelve thousand one hundred and twenty-five and $\frac{25}{100}$ dollars, as aforesaid, requested the plaintiffs to compromise and settle their, the plaintiffs', said claims against the defendants at the rate of sixty cents on each dollar thereof; and in consideration of the plaintiffs so agreeing to settle and compromise and as part of the same transaction the defendants then and there stipulated, promised, and agreed to and with the plaintiffs that they, the defendants, would not pay voluntarily to any of their, the defendants', creditors holding claims in excess of one thousand dollars to exceed sixty per cent. on the dollar in settlement, provided, however, that the payment of attorneys' fees and court costs in all cases where suits had been theretofore or might thereafter be commenced should not be considered as an evasion or violation of said agreement.

And the plaintiffs aver that in pursuance of said agreement of compromise and at the request of the defendants and as a mode of carrying the said agreement into effect and as part of the
46 same transaction they assigned their said claims to the said John J. Knickerbocker, who was then and there and is still the attorney and agent of said defendants, and who then and there, as such attorney and agent, paid the sum of money in said plea mentioned to the plaintiffs, being sixty cents on the dollar of the indebtedness aforesaid, for and on behalf of the defendants and with the money of the defendants, and took and held such assignment solely on behalf of and only for the use, benefit, and advantage of the defendants and not for his own use or for the use of any other person or persons soever except the defendants.

And the plaintiffs further aver that, in evasion and in violation of the said agreement of settlement and compromise, the defendants afterwards, at, to wit, the district aforesaid, on, to wit, the twenty-ninth day of December, A. D. 1883, and at divers other times subsequent thereto and before the commencement of this suit, did voluntarily pay to certain of their, the defendants', creditors holding

claims in excess of one thousand dollars more than sixty per centum
on the dollar in settlement of their respective claims over and
47 above attorneys' fees and court costs; and this the plaintiffs
are ready to verify.

Wherefore they pray judgment, etc.

DOOLITTLE & McKEY,
Pl'tffs' Attorneys.

48 And the plaintiffs, as to the plea of the said defendants,
Cleaveland and Cummings, by them thirdly above pleaded, say, by leave of court first had and obtained, that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that on and prior to, to wit, the twenty-ninth day of December, A. D. 1883, the defendants, at, to wit, the district aforesaid, became and were indebted to the plaintiffs in a large sum of money, to wit, the sum of $12,125.25, for divers goods, wares, and merchandize by the plaintiffs before that time sold and delivered to the defendants at the special instance and request of the defendants, and upon divers other promises and undertakings before that time made and entered into by the defendants to and with the plaintiffs, for the balance due upon which said indebtedness the plaintiffs bring their aforesaid action; that on and prior to, to wit, the said twenty-ninth day of December, A. D. 1883, at, to wit, the district aforesaid, the defendants represented to the plaintiffs that they, the defendants, were and had been for a long time next previous thereto insolvent, and then and there being indebted to the plaintiffs in a large sum of money, to wit, the sum of $12,125.25,
as aforesaid, requested the plaintiffs to compromise and settle
49 their, the plaintiffs', said claims against the defendants at the
rate of sixty cents on each dollar thereof, and in consideration of the plaintiffs so agreeing to settle and compromise and as part of the same transaction the defendants then and there stipulated, promised, and agreed to and with the plaintiffs that they, the defendants, would not pay voluntarily to any of their, the defendants', creditors holding claims in excess of one thousand dollars to exceed sixty per cent. on the dollar in settlement, provided, however, that the payment of attorneys' fees and court costs in all cases where suits had been theretofore or might thereafter be commenced should not be considered as an evasion or violation of said agreement.

And it was then and there further agreed, in consideration of the premises, by and between the plaintiffs and the defendants that if the defendants should pay any one or more of their, the defendants', creditors holding claims in excess of one thousand dollars more than sixty per centum on the dollar on the amounts due such creditor or creditors over and above attorneys' fees and court costs as aforesaid, then and in that event the defendants would pay the plaintiffs
on the indebtedness aforesaid as much on the dollar as they,
50 the defendants, should pay to any other creditor.

And the plaintiffs aver that, in pursuance of said agreement of compromise and at the request of the defendants and as a mode of carrying the said agreement into effect, they assigned their said claims to the said John J. Knickerbocker, who was then and there and is still the attorney and agent of said defendants, and who then and there, as such attorney and agent, paid the sum of money in said plea mentioned to the plaintiffs, being sixty cents on the dollar of the indebtedness aforesaid, for and on behalf of the defendants and with the money of the defendants, and took and held such assignment solely on behalf of and only for the use, benefit, and advantage of the defendants, and not for his own use or for the use of any other person or persons soever except the defendants.

And the plaintiffs further aver that the defendants afterwards, to
wit, — the district aforesaid, on, to wit, the twenty-ninth day of December, A. D. 1883, and at divers other times subsequent thereto
and before the commencement of this suit, did voluntarily pay to
certain of their, the defendants', creditors holding claims in
51 excess of one thousand dollars more than sixty per centum
on the dollar in settlement of their respective claims over and
above attorneys' fees and court costs, and did then and there pay such creditors at the rate of, to wit, one hundred per centum on the dollar; and this the plaintiffs are ready to verify. Wherefore they pray judgment, etc.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

52 And the plaintiffs, as to the plea of the said defendants, Cleaveland and Cummings, by them fourthly above pleaded, say that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that the plaintiffs did not, before the commencement of this suit or at any other time, accept from or receive of the said defendants the sum of seven thousand two hundred and seventy-five $\frac{15}{100}$ dollars or any other sum of money in full satisfaction or discharge of the said several promises or undertakings, or of any of the said sums of money in said declarations mentioned, in manner and form as the said defendants, impleaded, etc., have in said plea alleged; and this the plaintiffs pray may be inquired of by the country, etc.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

53 And the plaintiffs, as to the plea of the defendants, Cleaveland and Cummings, by them fourthly above pleaded, say, by leave of the court first had and obtained, that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that on and prior to, to wit, the said twenty-ninth day of December, A. D. 1883, the defendants became and were indebted to the plaintiffs on liquidated demands in a large sum of money, to wit, the sum of twelve thousand one hundred & twenty-five $\frac{25}{100}$ dollars, for goods, wares, and merchandise before that time sold and delivered to the defendants by the plaintiffs at the special instance and request of the defendants, and upon divers other promises and undertakings before that time made and entered into by the defendants to and with the plaintiffs;

that on or about the day last aforesaid the defendants requested
the plaintiffs to accept from them, the defendants, a less sum than
was then and there actually due the plaintiffs, to wit, to accept from
the defendants the sum of sixty cents on each dollar of said indebted-
ness, in full satisfaction and discharge of the said indebtedness;
54 that the plaintiffs did then and there, as in said plea alleged,
receive and accept the sum of money in said plea alleged, to
wit, the sum of seven thousand two hundred and seventy-five &
$\frac{15}{100}$ dollars, being the sum of sixty cents on each dollar of the indebt-
edness aforesaid, and leaving then and there and still unpaid the sum
of forty cents on each dollar, to wit, the sum of, to wit, four thousand
eight hundred and fifty and $\frac{10}{100}$ dollars, on said indebtedness, for
which sum last aforesaid the plaintiffs brings their aforesaid action.

And the plaintiffs aver that said supposed satisfaction and discharge in said plea mentioned was made without any good or valuable consideration as to the said sum of, to wit, four thousand eight hundred and fifty and $\frac{10}{100}$ dollars, and this the plaintiffs are ready to verify. Wherefore they pray judgment, etc.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

55 And the plaintiffs, as to the plea of the defendants, Cleaveland and Cummings, by them fourthly above pleaded, say, by leave of the court first had and obtained, that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that on and prior to, to wit, the said twenty-ninth day of December, A. D. 1883, the defendants became and were indebted to the plaintiffs on liquidated demands in a large sum of money, to wit, the sum of twelve thousand one hundred and twenty-five and $\frac{25}{100}$ dollars, for goods, wares, and merchandise before that time sold and delivered to the defendants by the plaintiffs at the special instance and request of the defendants, and upon divers other promises and undertakings before that time made and entered into by the defendants to and with the plaintiffs; that on or about the day last aforesaid the defendants requested the plaintiffs to accept from them, the defendants, a less sum than was then and there actually due the plaintiffs, to wit, to accept from the defendants the sum of sixty cents on each dollar of said indebtedness, in full satisfaction and discharge of the
said indebtedness; that the plaintiffs did then and there, as in
said plea alleged, receive and accept the sum of money in
56 said plea alleged, to wit, the sum of seven thousand two hun-
dred and seventy-five and $\frac{15}{100}$ dollars, being the sum of sixty
cents on each dollar of the indebtedness aforesaid, and leaving then
and there and still unpaid the sum of forty cents on each dollar, to wit,
the sum, to wit, four thousand eight hundred and fifty and $\frac{10}{100}$ dollars,
on said indebtedness, for which sum last aforesaid the plaintiffs bring
their aforesaid action; and, in consideration of the plaintiffs so agree-
ing to accept such less sum in satisfaction and discharge as aforesaid
and as part of the same transaction, the defendants then and there
stipulated, promised, and agreed to and with the plaintiffs that they,

the defendants, would not pay voluntarily to any of their, the defendants', creditors holding claims in excess of one thousand dollars to exceed sixty per cent. on the dollar in settlement, provided however, that the payment of attorneys' fees and court costs in all cases where suits had been theretofore or might thereafter be commenced should not be considered as an evasion or violation of said agreement.

And the plaintiffs aver that in evasion and in violation of said agreement of satisfaction and discharge the defendants after-
57 wards, at, to wit, the district aforesaid, on, to wit, the said twenty-ninth day of December, A. D. 1883, and at divers other times subsequent thereto and before the commencement of this suit, did voluntarily pay to certain of their, the defendants', creditors holding claims in excess of one thousand dollars more than sixty per centum on the dollar in settlement of their respective claims over and above attorneys' fees and court costs; and this the plaintiffs are ready to verify. Wherefore they pray judgment, etc.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

58 And the plaintiffs, as to the plea of the defendants, Cleaveland and Cummings, by them fourthly above pleaded, say, by leave of the court first had and obtained, that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that on and prior to, to wit, the said twenty-ninth day of December, A. D. 1883, the defendants became and were indebted to the plaintiffs on liquidated demands in a large sum of money, to wit, the sum of twelve thousand one hundred and twenty-five and $\frac{25}{100}$ dollars, for goods, wares, and merchandise before that time sold and delivered to the defendants by the plaintiffs at the special instance and request of the defendants, and upon divers other promises and undertakings before that time made and entered into by the defendants to and with the plaintiffs; that on or about the day last aforesaid the defendants requested the plaintiffs to accept from them, the defendants, a less sum than was then and there actually due the plaintiffs, to wit, to accept from the defendant- the sum of sixty cents on each dollar of said indebtedness, in full satisfaction and discharge of the said indebtedness; that the plaintiffs did then and there, as in said
59 plea alleged, receive and accept the sum of money in said plea alleged, to wit, the sum of seven thousand two hundred and seventy-five and $\frac{15}{100}$ dollars, being the sum of sixty cents on each dollar of the indebtedness aforesaid, and leaving then and there and still unpaid the sum of forty cents on each dollar, to wit, the sum of, to wit, four thousand eight hundred and fifty and $\frac{10}{100}$ dollars, on said indebtedness, for which sum last aforesaid the plaintiffs bring their aforesaid action; and in consideration of the plaintiffs so agreeing to accept such less sum in satisfaction and discharge as aforesaid, and as part of the same transaction, the defendants then and there stipulated, promised, and agreed to and with the plaintiffs that they, the defendants, would not pay voluntarily to any of their, the

defendants', creditors holding claims in excess of one thousand dollars to exceed sixty per cent. on the dollar in settlement, provided, however, that the payment of attorneys' fees and court costs in all cases where suits had been theretofore or might thereafter be commenced should not be considered as an evasion or violation of said agreement; and it was then and there further agreed, in consideration of the premises, by and between the plaintiffs and the 60 defendants that if the defendants should pay one or more of their, the defendants', creditors holding claims in excess of one thousand dollars more than sixty per centum on the dollar on the amounts due such creditor over and above attorneys' fees and court costs as aforesaid, then and in that event the defendants would pay the plaintiffs on the indebtedness aforesaid as much on the dollar as they, the defendants, should pay to any other creditor.

And the plaintiffs aver that the defendants afterwards, at, to wit, the district aforesaid, on, to wit, the twenty-ninth day of December, A. D. 1883, and at divers other times subsequent thereto and before the commencement of this suit, did voluntarily pay to certain of their, the defendants', creditors holding claims in excess of one thousand dollars more than sixty per centum on the dollar in settlement of their respective claims over and above attorney's fees and court costs, and did then and there pay such creditors at the rate of, to wit, one hundred per centum on the dollar; and this the plaintiffs are ready to verify. Wherefore they pray judgment, etc.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

61 UNITED STATES OF AMERICA,
Northern District of Illinois:

In the Circuit Court of the United States for said District.

GEORGE C. RICHARDSON *et al.*
v. } Assumpsit.
CLEVELAND *et al.*

It is hereby stipulated that the plaintiffs may reply double to the third and to the fourth pleas of the defendants Cleaveland and Cummings.

M. W. FULLER.

Chicago, December 1st, 1884.

(Endorsed:) Filed Dec. 4, 1884. Wm. H. Bradley, cl'k.

62 Afterwards, to wit, on the seventeenth of December, 1884, came Charles W. Woodruff and Washington Libby, by their attorney, and filed in said clerk's office their pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, to the December Term, A. D. 1884.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, CHARLES W. WOODRUFF, and WASHINGTON LIBBEY *ats.* GEORGE C. RICHARDSON, CHARLES Y. SMITH, George K. Guild, Ralph L. Cutter, and Harrison Gardner.	Assumpsit. Gen. No. 19193.

And the said defendants, Charles W. Woodruff and Washington Libbey, impleaded, &c., with James O. Cleaveland and Cornelius B. Cummings, by Melville W. Fuller, their attorney, come and defend the wrong and injury when, &c., and say that they did not, 63 together with their codefendants, James O. Cleaveland and Cornelius B. Cummings, undertake or promise in manner and form as the said plaintiffs have above thereof in the said declaration complained against them, the said Charles W. Woodruff and Washington Libbey, impleaded, &c., and of this they, the said Charles W. Woodruff and Washington Libbey, impleaded, &c., put themselves on the country, &c.

By M. W. FULLER,
Their Attorney.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

GEORGE C. RICHARDSON, CHARLES Y. SMITH, GEORGE K. GUILD, RALPH L. CUTTER, and HARRISON GARDNER *vs.* JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, CHARLES W. WOODRUFF, and WASHINGTON LIBBEY.	Assumpsit.

STATE OF ILLINOIS,
County of Cook, } *ss:*

64 Charles W. Woodruff, being duly sworn, deposes and says that he is one of the defendants in the above-entitled cause, and that he verily believes the said defendants have a good defense to said suit upon the merits to the whole of said plaintiffs' demand.

CHAS. W. WOODRUFF.

Subscribed and sworn to before me this 17th day of December, A. D. 1883.

[NOTARIAL SEAL.]

WILLIS SMITH,
Notary Public.

65 UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, to the December Term, A. D. 1884.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, Charles W. Woodruff, and Washington Libbey
ats.
GEORGE C. RICHARDSON, CHARLES Y. SMITH, George K. Guild, Ralph L. Cutter, and Harrison Gardner.
} Assumpsit. Gen. No. 19193.

And the said defendants, Charles W. Woodruff and Washington Libbey, impleaded, &c., with James O. Cleaveland and Cornelius B. Cummings, by Melville W. Fuller, their attorney, come and defend the wrong and injury, when, etc., and pray judgment of the said writ, because they say that the several supposed promises in the said plaintiffs' declaration were not made by the said defendants, impleaded, &c., with James O. Cleaveland and Cornelius B. Cummings, as copartners under the name of Cleaveland, Cummings & Woodruff, as therein alleged, or otherwise; and the said defendants, impleaded, &c., deny that they, together with their codefendants, James O. Cleaveland and Cornelius B. Cummings, were copartners
66 under the name of Cleveland, Cummings & Woodruff, as in said declaration is alleged, or otherwise; and this they, the said defendants, impleaded, &c., are ready to verify. Wherefore they pray judgment of the said writ, and that the same may be quashed.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

GEORGE C. RICHARDSON, CHARLES Y. SMITH, GEORGE K. GUILD, RALPH L. CUTTER, and HARRISON GARDNER
vs.
JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, CHARLES W. WOODRUFF, and WASHINGTON LIBBEY.
} Assumpsit.

STATE OF ILLINOIS,
County of Cook, } *ss:*

Charles W. Woodruff, being duly sworn, deposes and says that he is one of the defendants in above-entitled cause and has read the foregoing plea and knows the contents thereof, and that the same is true in substance and in fact.

67 CHAS. W. WOODRUFF.

Subscribed and sworn to before me this 17th day of December, A. D. 1884.

[SEAL.] WILLIS SMITH,
Notary Public.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, to the December Term, A. D. 1884.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, Charles W. Woodruff, and Washington Libbey *ats.* GEORGE C. RICHARDSON, CHARLES Y. SMITH, George K. Guild, Ralph L. Cutter, and Harrison Gardner.	Assumpsit. Gen. No. 19193.

And the said defendants, Charles W. Woodruff and Washington Libbey, impleaded, &c., with James O. Cleaveland and Cornelius B. Cummings, by Melville W. Fuller, their attorney, come and
68 defend the wrong and injury, when, &c., and pray judgment of the said writ, because they say that after the making of the said several supposed promises and undertakings in the said declaration mentioned and before the commencement of this suit, at, to wit, the district aforesaid, to wit, on the 29th day of December, 1883, the said plaintiffs, by their certain assignment in writing, signed by them under the firm name and style of George C. Richardson & Co., and now shown to the court here, the date whereof is a certain day and year last aforesaid, did sell, assign, transfer, set over, and deliver unto one John J. Knickerbocker, his heirs, executors, administrators, and assigns, in consideration of the sum of seven thousand two hundred seventy-five dollars and fifteen-hundredths, lawful money then and there by him paid to said plaintiffs, and said several promises and undertakings in the said declaration mentioned and each and every of them which they, the said plaintiffs, then had or which they, the said plaintiffs, should, might, or could have against the said defendants, impleaded, &c., by reason of the happening of any matter or thing from the beginning of the world to the date last aforesaid, as by the said assignment or writing,
69 reference being thereunto had, will fully appear; and this the said defendants, impleaded, etc., are ready to verify. Wherefore they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action against them, &c.

And, for a further plea in this behalf, these defendants, Charles W. Woodruff and Washington Libbey, impleaded, &c., with James O. Cleaveland and Cornelius B. Cummings, say that the said plaintiffs ought not to have their aforesaid action against them, because they say that after the making of the said several supposed promises and undertakings in the declaration mentioned and before the commencement of said suit, to wit, on the 29th day of December,

1883, the said defendants delivered to the said plaintiffs and the said plaintiffs accepted of them the sum of seven thousand two hundred seventy-five and fifteen-hundredths dollars in full satisfaction and discharge of the said several promises and undertakings and of all the said sums of money in the said declaration mentioned, and which said sum of, to wit, $\$7{,}275\frac{15}{100}$ths, *was* paid as aforesaid, they, the said plaintiffs, then and there accepted and received of and from the said defendants in full satisfaction
70 and discharge of the said several promises and undertakings
and of all the sums of money in said declaration mentioned; and this the defendants impleaded, &c., are ready to verify. Wherefore they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

By M. W. FULLER,
Att'y for said Def'ts.

(Endorsed:) Filed Dec'r 17, 1884. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the second day of January, 1885, came the plaintiffs, by their attorneys, and filed in said clerk's office their demurrer to the pleas of Charles W. Woodruff and Washington Libbey in said entitled cause; which said demurrer is in the words and figures following, to wit:

71 *Demurrer.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

GEORGE C. RICHARDSON *et al.*
vs.
JAMES O. CLEVELAND *et al.*
} Assumpsit.
Gen. No. 19193.
Term No. 430.

And the plaintiff, as to the plea in abatement of the defendants, Charles W. Woodruff and Washington Libbey, by them above pleaded, say that the said plea and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to quash the said writ, and that the said plaintiffs are not bound in law to answer the same; and this they are ready to verify. Wherefore, for want of a sufficient plea in this behalf, the plaintiffs pray judgment, and that the said defendants, Woodruff and Libbey, may answer further to the said declaration, etc.

And the plaintiffs state and show to the court here the fol-
72 lowing causes of demurrer to said plea—that is to say, that—

First. Said plea does not give the plaintiffs a better writ.

Second. Said plea concludes with a verification, whereas it should conclude to the contrary.

And also that the said plea is in other respects uncertain, informal, and insufficient.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

Endorsed: Filed Jan'y 2, 1885. Wm. H. Bradley, clerk.

Afterwards, to wit, on the fifth day of January, 1885, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

73 *Stipulation.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

GEORGE C. RICHARDSON *et al.*
vs.
JAMES O. CLEVELAND *et al.* } Assumpsit. Gen. No. 19193. Term No. 430.

It is hereby stipulated and agreed that the replication heretofore filed in the above-entitled cause to the pleas of the defendants, James O. Cleveland and Cornelius B. Cumming, shall stand and be considered as replications to the pleas in this cause of the defendants, Charles W. Woodruff and Washington Libbey, it being understood that said replications shall be considered, with respect to the pleas of said Woodruff and Libbey, as so amended that each replication shall be a reply to the same plea as in the case of the pleas of said Cleveland and Cummings, and that a *similiter* is also filed to the plea of the general issue.

Jan'y 5, 1885.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.
M. W. FULLER,
Defendants' Attorney.

Endorsed: Filed Jan'y 5, 1885. Wm. H. Bradley, clerk.

74 On the same day, to wit, on the fifth day of January, 1885, in the December term of said court, 1884, in the record of proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

GEORGE C. RICHARDSON
vs.
JAMES O. CLEVELAND *et al.* } Assumpsit.

Now come the parties, by their attorneys, and by agreement the hearing upon the demurrer to the plea in abatement filed herein is continued to Wednesday next.

Afterwards, to wit, on the twelfth day of January, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

George C. Richardson }
vs. } Assumpsit.
James O. Cleveland *et al.* }

On motion of the plaintiff, by his attorney, the defendants are hereby ruled to rejoin herein in fifteen days.

Afterwards, to wit, on the 27th day of January, 1885, came the defendants, by their attorney, and filed in said clerk's office their demurrer to the 2nd & 3rd replications to 3d & 4th pleas in said entitled cause; which said demurrer is in the words and figures following, to wit:

75 *Demurrer.*

United States of America, *Northern District of Illinois:*

In the Circuit Court of the United States for the Northern District of Illinois.

James O. Cleveland *et al.* }
ats. }
George C. Richardson *et al.* }

And the said defendants say that the second and third replications of the said plaintiffs to the third and fourth pleas of the said defendants and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the plaintiffs to have or maintain their aforesaid action against the said defendants, and that they, the said plaintiffs, are not bound by law to answer the same or any or either of them; and this they are ready to verify. Wherefore, by reason of the insufficiencies of the aforesaid replications in this behalf, the said defendants pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, etc.; and the said defendants
76 state and show to the court here the following causes of demurrer to the said replications, to wit:

First. That the second replication to the third and fourth pleas are contradictory, in this, that in the introductory portions thereof they and each of them state and aver a consideration for the whole transaction and in conclusion thereof they and each of them deny the former averment by alleging a want of consideration; and the said replications upon their face show a satisfaction of *of* the claim sued for.

Second. That the third replications to the third and fourth pleas do not negative any of the averments of the pleas; neither do they show any contract or agreement in evasion of the defense set forth in said third and fourth pleas; and, further, for that the said replications set fourth and allege a contract which is not sufficient in law to sustain this suit, and that said replications are argumentative and contradictory.

And also that said replications are in other respects uncertain, informal, insufficient, and defective.

M. W. FULLER,
Attorney for Defendant-.

Endorsed: Filed Jan'y 27, 1885. Wm. H. Bradley, clerk.

77 On the same day, to wit, on the 27th day of January, 1885 came the defendants, by their attorney, and filed in said' clerk's office their rejoinders to 1st replication to 2, 3, & 4th pleas and 4th replication to 3d & 4th pleas in said-entitled cause; which said rejoinders are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES O. CLEAVELAND *et al.*
ats.
GEORGE C. RICHARDSON *et al.*

And the said defendants, as to the first replication to the second plea and the first replication to the third plea and the first replication to the fourth plea of the said defendants, and which the said plaintiffs have prayed may be enquired of by the country, doth the like, etc.

M. W. FULLER,
Attorney for Defendants.

And the said defendants, as to the fourth replication of the said plaintiffs to the said third plea of the said defendants, say that 78 the said plaintiffs ought not, by reason of anything by them in that replication alleged, to have or maintain their aforesaid action thereof against them, because they say that they did not, on and prior —, to wit, the 29th day of December, 1883, become indebted to plaintiffs in the sum of $12,125.25 for goods, wares, and merchandise by the plaintiffs before then sold and delivered to defendants, at their request or upon their promise before that time entered into, and deny that on or prior to the said 29th day of December, 1883, at the district aforesaid, they represented to plaintiffs that they were and had been for a long time previous insolvent, or that, being indebted to plaintiffs in the sum of $12,125.25, requested them to compromise and settle the same at the rate of sixty cents on each dollar thereof, or that, in consideration of the plaintiffs' agreeing thereto, stipulated, promised, and agreeed with said plaintiffs that defendants would not pay voluntarily to any of their, the defendants', creditors holding claims in excess of one thousand dollars to exceed sixty per cent. on the dollar for settlement, except that the payment of attorneys' fees and court costs in all cases where suits had been theretofore or might thereafter be commenced should not be considered an evasion of said agreement.

79 And deny that it was further agreed, in consideration of the alleged premises, between plaintiffs and defendants that if defendants should pay any one or more of their creditors holding claims in excess of one thousand dollars more than sixty per cent. on the dollar on the amounts due such creditor or creditors over and above attorneys' fees and court costs, *and that* then and in that event the defendants would pay plaintiffs on the alleged indebtedness as much on the dollar as they, the defendants, should pay to any other creditor.

And deny that, in pursuance of said alleged compromise and at the request of defendants, as a mode of carrying said alleged agreement into effect, said plaintiffs assigned said claim to John J. Knickerbocker, who was then and there or [and] who still is the attorney and agent of the said defendants or as such attorney or agent paid the alleged sum of money with the money of the defendants to said plaintiffs, who took and held such alleged assignment solely on behalf of and only for the use, benefit, and advantage of defendants, and not for his own use or otherwise, as therein alleged.

80 And further deny that they afterwards, at the district aforesaid, on the 29th day of December, 1883, or at divers other times subsequent thereto and before the commencement of this suit, voluntarily paid to certain of defendants' creditors holding claims in excess of one thousand dollars more than sixty per cent. on the dollar in settlement of their respective claims over and above attorneys' fees and court costs, or did then and there or at any time pay such creditors at the rate of, to wit, one hundred per centum on the dollar in manner and in form as in said replication alleged and set forth; and of this the said defendants put themselves upon the country, etc.

And the said defendants, as to the fourth replication of the said plaintiffs to the said third plea of the said defendants, by leave of court for that purpose first had and obtained, say that the said plaintiffs ought not, by reason of anything by them in that replication alleged, to have or maintain their aforesaid action thereof against the said defendants, because they say that while they were indebted to said plaintiffs in the sum of $12,125.25 for goods, wares, and merchandise before that time sold and delivered to defendants that [they], being insolvent and unable to pay their 81 indebtedness in full, at the district aforesaid, on the said 29th day of December, 1883, requested the plaintiffs to compromise and settle their said alleged claims at the rate of sixty per cent. on each dollar thereof, but deny that, in consideration of plaintiffs agreeing so to settle and compromise and as part of the same transaction, they stipulated, promised, and agreed to and with plaintiffs that they would not pay voluntarily to any of their, the defendants', creditors holding claims in excess of one thousand dollars to exceed sixty per cent. on the dollar in settlement, as therein alleged.

And they deny that it was further agreed, in consideration of the premises, by and between plaintiffs and defendants that if defendants should pay any one or more of their creditors holding claims in excess of one thousand dollars more than sixty per cent. on the dollar on the amount due such creditors over and above attorneys' fees and court costs as aforesaid, that then and in that event defendants would pay plaintiffs on the indebtedness aforesaid as large a per cent. on the dollar as they, the defendants, should pay to any other creditors.

82 And deny that in pursuance of said alleged agreement and in order to carry the same into effect plaintiff- assigned their claims to one John J. Knickerbocker, the attorney and agent of the defendants, or that said Knickerbocker paid a sum with the moneys of these defendants, but avers that the said sum of money so paid in liquidation and satisfaction of the claim of said plaintiffs was so paid as in said third plea alleged and not otherwise.

And defendants deny that they afterwards, at, to wit, the district aforesaid, on, to wit, the 29th day of December, 1883, or at divers other times subsequent thereto and before the commencement of this suit or afterwards, paid certain creditors holding claims in excess of one thousand dollars more than sixty per cent. on the dollar in settlement thereof over and above attorneys' fees and court costs, or did then and there pay such creditors at the rate of one hundred per centum on the dollar in manner and form as is in said replication alleged; and of this they put themselves upon the country, etc.

83 And the said defendant-, as to the fourth replication of the said plaintiffs to the said fourth plea of the said defendants, say that the said plaintiffs ought not, by reason of anything by them in that replication alleged, to have or maintain their aforesaid action thereof against them, because they say that they did not, on and prior to the said 29th day of December, 1883, become indebted to plaintiffs in the sum of $12,125.25 for goods, wares, and merchandise by the plaintiffs before then sold and delivered to defendants at their request or upon their promise, before that time entered into; and deny that on or prior to the said 29th day of December, 1883, at the district aforesaid, they represented to plaintiffs that they were and had been for a long time previous insolvent, or that, being indebted to plaintiffs in the sum of $12,125.25,— requested them to compromise and settle the same at the rate of sixty cents on each dollar thereof, or, in consideration of the plaintiffs agreeing thereto, stipulated, promised, and agreed with said plaintiffs that defendants would not pay voluntarily to any of their, the defendants', creditors holding claims in excess of one thousand dollars to exceed sixty per cent. on the dollar in settlement, except that the payment of attorneys' fees and court costs in all cases where suits had been theretofore or might thereafter be commenced should not be considered an evasion of the alleged agreement.

84 And deny that it was further agreed, in consideration of the alleged premises, between plaintiffs and defendants that if defendants should pay any one or more of their creditors holding claims in excess of one thousand dollars more than sixty per

cent. on the dollar on the amounts due such creditors over and above attorneys' fees and court costs that then and in that event the defendants would pay plaintiffs on the alleged indebtedness as much on the dollar as they, the defendants, should pay to any other creditor.

And deny that, in pursuance of said alleged compromise and at the request of defendants, as a mode of carrying said alleged agreement into effect, said plaintiffs assigned said claim to John J. Knickerbocker, who was then and there or who still is the attorney and agent of the said defendants, or as such attorney or agent paid the alleged sum of money with the money of the defendants to said plaintiffs, who took and held such alleged assignment solely on behalf of and only for the use, benefit, and advantage of defendants, and not for his own use or otherwise, as therein alleged.

85 And further deny that they did afterwards, at the district aforesaid, on the 29th day of December, 1883, or at divers other times subsequent thereto, before the commencement of this suit, voluntarily pay to certain of defendants' creditors holding claims in excess of one thousand dollars more than sixty per cent. on the dollar in settlement of their respective claims over and above attorneys' fees and court costs, or did then and there or at any time pay such creditors at the rate of, to wit, one hundred per cent. on the dollar, in manner and form as in said replication alleged and set forth; and of this the said defendants put themselves upon the country, etc.

And the said defendants, as to the fourth replication of the said plaintiffs to the said fourth plea of the said defendants, by leave of court for that purpose first had and obtained, say that the said plaintiffs ought not, by reason of anything in that replication alleged, to have or maintain their aforesaid action thereof against the said defendants, because they say that while they were indebted to plaintiffs in the sum of $12,125.25 for goods, wares, and merchandise before that time sold and delivered to defendants, that 86 defendants, being insolvent and unable to pay their indebtedness, at the district aforesaid, on the said 29th day of December, 1883, did request the plaintiffs to compromise and settle their alleged claim at the rate of sixty per cent. on each dollar thereof, but deny that, on consideration of plaintiffs agreeing so to settle and compromise and as part of the same transaction, they stipulated, promised, and agreed to and with the plaintiffs that they would not pay voluntarily to any of their, the defendants', creditors holding claims in excess of one thousand dollars to exceed sixty per centum on the dollar in settlement, as therein alleged.

And they deny that it was further agreed, in consideration of the premises, by and between the plaintiffs and defendants that if defendants should pay any one or more of their creditors holding claims in excess of one thousand dollars more than sixty per centum on the dollar on the amount due such creditor or creditors over and above attorneys' fees and court costs, as aforesaid, that then and in that event defendants would pay plaintiffs on the indebtedness aforesaid as large a per cent. on the dollar as they, the defendants, should pay to any other creditor.

87 And deny that, in pursuance of said alleged agreement and in order to carry the same into effect plaintiffs assigned their claims to one John J. Knickerbocker, the attorney and agent of the defendants, or that said Knickerbocker paid said sum with the money of these defendants, but aver that the said sum of money so paid in liquidation and satisfaction of the claim of said plaintiffs was so paid as in said fourth plea alleged and not otherwise.

And defendants deny that they afterwards, at, to wit, the district aforesaid, on, to wit, the 29th day of December, 1883, or at divers other times subsequent thereto and before the commencement of this suit or afterwards, paid certain creditors holding claims in excess of one thousand dollars more than sixty per centum on the dollar in settlement thereof over and above attorneys' fees and court costs, or did then and there pay such creditors at the rate of one hundred per centum on the dollar, in manner and form as in said replication alleged; and of this they put themselves upon the country, etc.

M. W. FULLER,
Defendants' Attorney.

(Endorsed :) Filed Jan'y 27, 1885. Wm. H. Bradley, cl'k.

88 Afterwards, to wit, on the thirtieth day of March, 1885, came the plaintiffs, by their attorneys, and filed in said clerk's office their replication to the plea in abatement in said entitled cause; which said replication is in the words and figures following, to wit:

89 *Replication.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the District Aforesaid.

RICHARDSON *et al.*
vs.
CLEVELAND *et al.* } Assumpsit. 19,193.

And the plaintiffs, as to the plea of the defendants, wherein the defendants pray judgment of the said writ and that the same may be quashed, say that the said writ ought not to be quashed, because they say that the said several promises in the plaintiffs' declaration mentioned were made by the defendants as copartners under the name of Cleveland, Cummings & Woodruff, as in the declaration alleged. and the plaintiffs aver that the defendants were copartners under the name of Cleveland, Cumming & Woodruff, as in the declaration alleged; and this the plaintiffs pray may be inquired of by the country, etc.

DOOLITTLE & McKEY,
Plaintiffs' Attorneys.

Endorsed: Filed Mar. 30, 1885. Wm. H. Bradley, clerk.

90 Afterwards, to wit, on the fifth day of October, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

GEORGE C. RICHARDSON
vs. } Assumpsit.
JAMES O. CLEVELAND *et al.*

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendants to the second and third replications to the third and fourth pleas filed herein, and, after hearing the arguments of counsel, the court sustains said demurrer, and on motion of the plaintiff, by his attorney, leave is given him to amend his said third replication.

Afterwards, to wit, on the twenty-third day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

GEORGE C. RICHARDSON *et al.*
vs. } Assumpsit.
JAMES O. CLEVELAND *et al.*

91 Now come the parties, by their respective attorneys, and the plaintiffs, by their attorney, suggest to the court the death of the defendant, Charles W. Woodruff, and on motion it is ordered that this suit proceed against the surviving defendant; and now, upon issue joined herein, thereupon come a jury of good and lawful men, to wit, H. H. Thornton, Joseph Pollak, Joseph H. Abercrombie, John Sullivan, D. E. Lee, L. Bander, A. W. Beecher, G. W. Galliday, A. W. Cochran, Thomas Dennis, Orange Daniels, and Robert Spafford, who were all duly elected, tried, and sworn well and truly to try said issue; and, after hearing the opening statements of the counsel, on motion of the plaintiffs, by their attorney, leave is given them to withdraw a juror and postpone the case; and thereupon it is ordered that a juror be withdrawn, the panel discharged, and the trial postponed to a future day.

Afterwards, to wit, on the thirteenth day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge is the following entry, to wit:

Order.

George C. Richardson }
vs. } Assumpsit.
James O. Cleveland *et al.* }

92 Now come the parties, by their attorneys, and upon issue joined herein, by agreement of the parties, by their attorneys, in open court they waive the intervention of a jury and for trial put themselves upon the court; and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to morrow morning.

Afterwards, to wit, on the fourteenth day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

George C. Richardson *et al.* }
vs. } Assumpsit.
James O. Cleveland *et al.* }

Now come again the parties, by their attorneys, and after hearing the concluding evidence and the arguments of the respective counsel, the court takes the same under advisement.

On the same day, to wit, on the fourteenth day of April, 1886, there were filed in said clerk's office the special findings of the court in said entitled cause; which special findings are in the words and figures following, to wit:

93 *Findings of Court.*

In the Circuit Court of the United States, Northern District of Illinois.

George C. Richardson *et al.*
vs.
James O. Cleaveland, Cornelius B. Cummings, and Washington Libbey, Surviving Partners of Charles W. Woodruff.

This cause having been submitted to the court for trial without the intervention of a jury, and the court having heard the evidence, doth find from the evidence the following facts:

I.

James O. Cleaveland, Cornelius B. Cummings, and Washington Libbey, three of the defendants, with one William F. Shelley, on the thirty-first day of December, 1881, formed a limited copartnership under the statute of the State of Illinois in that behalf, under the
name of "Cleaveland, Cummings & Shelley," to do a whole-
94 sale business in merchandise in Chicago, in which the said
Washington Libbey was a limited partner, having put in
$50,000 of capital.

II.

About the first of May, 1883, that the said Shelley went out of the firm and Charles W. Woodruff, the other defend- in this cause, came into the firm, which assumed the name of "Cleaveland, Cummings & Woodruff," and continued to do business until as hereinafter stated.

III.

That said firm of "Cleaveland, Cummings & Woodruff" intended, as between themselves, to do business as a limited partnership, but they did not take the steps required by law to make said firm a limited partnership under the statute of Illinois in that behalf.

IV.

That the plaintiffs sold to the firm of Cleaveland, Cummings & Woodruff, upon the 28th, 29th, and 30th of August, 1883, and upon the 14th and 15th of September, A. D. 1883, merchandise to the amount of $8,064.03, payable by the said firm in sixty days from
Sept. 15th, and on the 24th of October sold to Cleaveland,
95 Cummings & Woodruff merchandise to the amount of
$1,291.83, payable in sixty days from November 1st, and also
that the plaintiffs were the holders of two notes of said Cleaveland, Cummings & Woodruff, dated Chicago, September 15, 1883, due in four months from the date thereof, payable to the order of the defendants and endorsed by them, one for $1,347.99 and one for $1,421.40, which two notes matured January 18, 1884; said several amounts aggregating $12,125.25.

V.

That on the thirtieth day of October, 1883, Washington Libbey paid to James O. Cleaveland $1,000 for his interest in the firm of Cleaveland, Cummings & Woodruff, and said James O. Cleveland, Cornelius B. Cummings, Charles W. Woodruff, and Washington Libbey signed and delivered to James O. Cleaveland an instrument in writing as follows, viz:

"The copartnership heretofore existing between James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff, and Washington Libbey, under the firm name of Cleaveland, Cummings & Wood-

ruff, has this day been dissolved by mutual consent, and such dissolution to take effect Nov. 1, 1883. All accounts and in-
96 debtedness due the late firm of Cleaveland, Cummings & Woodruff must be paid to Cummings, Woodruff & Brown, successors to Cleaveland, Cummings & Woodruff, by whom all liabilities of the late firm must be paid and said Cleveland held harmless therefrom.

Dated Chicago, Illinois, Oct 30, A. D. 1883.

JAMES O. CLEAVELAND.
(Signed) C. B. CUMMINGS.
CHARLES W. WOODRUFF.
WASHINGTON LIBBEY.

VI.

That it was contemplated October 30, 1883, that a new firm would be formed, composed of Cornelius B. Cummings, Charles W. Woodruff, and Swan Brown, as general partners, and Washington Libbey, as special partners, but said firm was never formed, but the said Cleaveland supposed it was so formed when he sold out his interest to the said Libbey.

VII.

That the firm of Cleaveland, Cummings & Woodruff stopped business on or before November 14, 1883; that said firm owed for borrowed money about $179,000, which was unsecured, and for merchandise about $461,000, and that the assets of said firm were
97 sufficient to pay the borrowed money in full and not quite sixty per cent. on the dollar upon the mercantile debts. The said Washington Libbey was reputed to be a man of large wealth.

VIII.

On the fourteenth day of November, 1883, all the bills receivable, notes, and accounts of Cleaveland, Cummings & Woodruff were sold to Columbus R. Cummings for his two notes for $201,110.43, one for $110,000, which was delivered to the Union National Bank in full payment of borrowed money due by said firm to said bank, the other for $91,110.43 was delivered to a member of said firm of Cleaveland, Cummings & Woodruff; that Columbus R. Cummings was a brother of Cornelius B. Cummings and a director in the Union National Bank, to which he had introduced said firm, and felt in honor bound to see that the bank suffered no loss.

IX.

That immediately thereafter Cleaveland, Cummings & Woodruff sent J. J. Knickerbocker, as their attorney, to New York and proposed to the mercantile creditors of that firm to pay them sixty cents on the dollar of their respective claims; that when ap-
98 plication to the plaintiffs was made to accept sixty cents on the dollar of their claims some had settled at that rate and

some had not. The attorney of Cleaveland, Cummings & Woodruff explained the situation of the assets of Cleaveland, Cummings & Woodruff, saying that the borrowed money was to be paid in full, which would not leave enough to pay quite sixty per cent. of the remaining indebtedness; that Libbey's liability as a member of the firm was spoken of, when said attorney stated to the plaintiffs that he had not had opportunity to examine into the question and was not in possession of information to know whether Libbey could make a successful defense or not, but that it was a question they could investigate for themselves; that one of said plaintiffs said to said attorney they had sold no goods to the defendants on the strength that Libbey was more than a special partner; that no credit had been given to the firm on the faith that Libbey sustained any other relation to it; that Libbey had lost his special capital, and that they had no desire to make him pay more. It does not appear, however, from the evidence that the defendants or their attorney com-
99 municated to the plaintiffs the fact that Libbey had signed the instrument in writing referred to in the fifth finding, or that he made any statement as to Libbey's financial ability to pay the debts of said firm.

The plaintiffs at first refused, but about the 29th day of December, 1883, upon the receipt of the sum of $7,275.15, which was sixty per cent. of their entire claim, they, by their agent, Walter M. Smith, executed and delivered to the said John J. Knickerbocker, the attorney for the defendants, at Chicago, an instrument in writing, as follows:

"For and in consideration of the sum — seven thousand two hundred and seventy-five and $\frac{15}{100}$ ($7,275.15) dollars, to us in hand paid by John J. Knickerbocker, of Chicago, Ill., the receipt whereof is hereby acknowledged and confessed, and [we] have sold, assigned, transferred, and delivered, and do hereby sell, assign, transfer, set over, and deliver, to said Knickerbocker, his heirs, executors, administrators, and assigns, the above and foregoing claim in our favor and against the late firm of Cleaveland, Cummings & Woodruff, and all other claims and demands which we now have or might or
100 could have against the said Cleaveland, Cummings and Woodruff by reason of the happening of any matter or thing from the beginning of the world to the day of the date hereof, without recourse to us, and authorize and empower said Knickerbocker to sue for, collect, settle, compound, and give acquittance therefor as fully as we could do in person.

In witness whereof we have hereunto set our hand- and seal- this 29th day of December, 1883.

GEORGE C. RICHARDSON & CO., [SEAL.]
Per WALTER M. SMITH. [SEAL.]"

Attached to said instrument are the following:

"CHICAGO, *Sept.* 15, 1883.

Four months after date we promise to pay to the order of ourselves one thousand three hundred and forty-seven $\frac{99}{100}$ dollars at the Mechanics' National Bank, N. Y., value received.

Due Jan'y 18, 1884.

$1,347.99. CLEAVELAND, CUMMINGS & WOODRUFF."

(Endorsed:) "Cleaveland, Cummings & Woodruff."

"CHICAGO, *Sept.* 15, 1883.

Four months after date we promise to pay to the order of ourselves one thousand four hundred and twenty-one dollars and $\frac{41}{100}$ at the Mechanics' National Bank, N. Y., value received.

Due Jan'y 18, 1884.

$1,421.41. CLEAVELAND, CUMMINGS & WOODRUFF."

(Endorsed:) Cleaveland, Cummings & Woodruff.

101 "Mess. Cleaveland, Cummings & Woodruff to George C. Richardson & Co., debtors.

1883.						
Aug.	28.	To mdse.,	60 days,	Sept. 15	333	94
	29.	"	"	"	853	79
	"	"	"	"	156	06
	30.	"	"	"	859	35
	"	"	"	"	4,783	65
Sept.	14.	"	"	"	324	74
	15.	"	"	"	227	17
	"	"	"	"	525	33
Oct.	24.	"	"	Nov. 1	1,291	83
					9,355	83

And Charles W. Woodruff, one of the said defendants, at the same time and as part of the same arrangement, delivered to the said agent of the plaintiffs an instrument in writing as follows, viz:

"John J. Knickerbocker. Jesse Holdom.

Knickerbocker & Holdom, attorneys-at-law, 164 La Salle St.

CHICAGO, —— —, 188–.

In consideration of a compromise this day made by Messrs. Geo. C. Richardson & Co. and Messrs. Jay, Langdon & Co., of New York city, of their respective claims against the late firm of Cleaveland, Cummings & Woodruff, of Chicago, Ill., the said Cleaveland, Cummings & Woodruff stipulate and agree not to pay voluntarily to any of their creditors holding claims in excess of one thousand dollars to exceed sixty per cent. on the dollar in settlement, Providing, however, that the payment of attorneys' fees and court costs in all cases where suits have been heretofore or may hereafter be commenced shall not be considered as an evasion or violation of this agreement. 102

CLEAVELAND, CUMMINGS & WOODRUFF.

Dec. 29th, 1883."

X.

That in April, 1884, all the mercantile debts of Cleaveland, Cummings & Woodruff have been settled at sixty cents and released, except about $88,000; that the firm of Vietor & Archelis had not released their claim, but had brought a suit by attachment thereon against James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff, and Washington Libbey, which was about to be tried; that the attorney of Cleaveland, Cummings & Woodruff paid to Vietor & Achelis sixty cents on the dollar of their claim, who thereupon released their said claim; but at the same time said attorney of Cleaveland, Cummings & Woodruff gave his check (which was afterwards paid) to the attorneys of Vietor & Achelis for twenty-five per cent. on the dollar of said claim, and said attorneys 103 remitted twenty of said twenty-five per cent. to Vietor & Achelis; that this payment to the attorneys of Vietor & Achelis was a cover under which Vietor & Achelis were to and did receive on their claim more than sixty per cent., and such payment was made after Vietor & Achelis had refused to take sixty per cent. by agreement between the attorneys of Cleaveland, Cummings & Woodruff and Vietor & Achelis that Vietor & Achelis should receive eighty per cent.

XI.

That the amount due on the original claim is $4,850.10, and the interest thereon from December 29th, 1883, to April 14th, 1886, is $679.35, making $5,529.45 in all.

Which special findings are hereby signed and sealed this 14th day of April, A. D. 1886, and made a part of the record hereof.

WALTER Q. GRESHAM, [SEAL.]
Circuit Judge.

Endorsed: Filed April 14, 1886. Wm. H. Bradley, cl'k.

104 Afterwards, to wit, on the twentieth day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Judgment.

George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner
vs.
James O. Cleveland, Cornelius B. Cummings, and Washington Libbey, Survivors of Charles W. Woodruff, Deceased.
} Assumpsit.

Now come the parties, by their attorneys, and the court, having considered and being now fully advised upon the matters heretofore submitted herein, finds the issues for the plaintiffs and assesses their damages at five thousand five hundred and twenty-nine dollars and forty-five cents.

And thereupon the defendants, by their attorneys, move the court for a new trial herein, and the court, being fully advised upon said motion, overrules the same and awards judgment; to which ruling of the court the defendants, by their attorneys, now except.

It is thereupon considered and adjudged by the court that said plaintiffs do have and recover of said defendants, James O. Cleveland, Cornelius B. Cummings, and Washington Libbey, 105 survivors of Charles W. Woodruff, the said sum of five thousand five hundred and twenty-nine dollars and forty-five cents, their damages so as aforesaid assessed, together with their costs in this behalf expended, amounting to one hundred and forty-seven dollars and eighty cents, and that they have execution therefor.

And on motion of the defendants, by their attorney, the court fixes the amount of the bond given for writ of error at seven thousand dollars, which, when approved and filed, shall operate as a supersedeas.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

106 *Bill of Exceptions.*

In the Circuit Court of the United States, Northern District of Illinois

GEORGE C. RICHARDSON *et al.*
vs.
JAMES O. CLEVELAND, CORNELIUS B. CUMMINGS and WASHINGTON LIBBEY, Surviving Partners of Charles W. Woodruff.

Be it remembered that the above-entitled cause came on for trial on the 13th day of April, A. D. 1883, before the judge of said circuit court, a trial by jury having been duly waived therein by consent in open court, and was continued unto and including the 14th day of said month of April.

And the plaintiff adduced evidence tending to maintain and prove the issues on their part and the defendants adduced evidence tending to maintain and prove the issues on their part. To the introduction of the written paper set forth in the 5th special finding, dated October 30, 1883, the defendants, when the same was offered in evidence, objected upon the ground that the same was in- 107 competent and irrelevant; but the court overruled the objection and admitted the paper in evidence, and the defendants then and there, by their counsel, duly excepted.

The plaintiffs also offered in evidence, to maintain and prove the issues on their part, the paper signed Cleveland, Cumming & Woodruff and dated December 29th, 1883, and set forth at the close of the 9th special finding; to the introduction of which paper in evidence the defendants objected upon the grounds of variance and incompetency; but the court overruled the objection and admitted the paper in evidence and the defendants, by their counsel, then and there duly excepted.

Evidence was introduced touching the matters named in the 10th special finding, and the defendants adduced evidence tending to show that no payment was made to either of the mercantile creditors by preference or with a view to discriminate between one of said creditors and another. The defendants objected to the evidence tending to show that Vietor and Achelis were paid more than sixty per cent., upon the ground that such payment, if made as claimed by plaintiffs, was not voluntarily made; but the court over-
108 ruled the objection and held that under the contract of December 29th, 1883, signed "Cleveland, Cummings & Woodruff," any payment over sixty per. cent was made voluntarily unless such claim had gone to judgment; to which ruling by the court the defendants, by their counsel, duly excepted.

It appears from the evidence that the borrowed money was paid in full during November, 1883, and that each of the mercantile creditors received sixty cents on the dollar of their claims from Cleveland, Cummings & Woodruff.

Upon the conclusion of the evidence the court found the issues for the plaintiffs and the special findings in the record contained, and the defendants, by their counsel, moved to set aside said findings and for a new trial in the words and figures following, to wit:

In United States Circuit Court, Northern District of Illinois.

GEO. C. RICHARDSON & *als.*
vs.
C. B. CUMMINGS & *als.*

And the defendants come and move that the findings and
109 assessment of damages herein be set aside and a new trial granted for the following reasons, to wit: That the court erred in the admission of incompetent and improper evidence on the part of the plaintiffs and in overruling defendants' objection thereto; that the court erred in excluding proper and competent evidence offered in behalf of the defendants and in sustaining plaintiffs' objection thereto; that the court erred in finding the issues for the plaintiffs, such findings being against the law and the evidence and the weight of evidence; that the court erred in its special findings and each of them; that the issues should have been found for the defendants and not for the plaintiffs, and for other reasons.

By M. W. FULLER,
Their Attorney.

Endorsed: Filed Apr. 14, 1886. Wm. H. Bradley, clerk.

But the court overruled said motion for a new trial and entere5 judgment upon said findings in favor of the plaintiffs for $5,529.4

To which decisions and ruling of the court in overruling
110 said motion for a new trial and in entering said judgment upon the findings, and in making said special findings and each of them the defendants, by their counsel, then and there duly excepted.

And forasmuch as the matters and things aforesaid would not otherwise appear the foregoing bill of exceptions is signed and sealed and made a part of the record of said cause this 14th day of April, A. D. 1886.

WALTER Q. GRESHAM. [SEAL.]

Endorsed: Filed Apr. 20, 1886. Wm. H. Bradley, clerk.

111 Afterwards, to wit, on the twenty-second day of April, 1886, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Columbus R. Cummings and O. S. Gaither and Geo. A. Ives, of the county of Cook and State of Illinois, are held and firmly bound unto Geo. C. Richardson, Chas. S. Smith, Geo. K. Guild, Ralph L. Cutter, and Harrison Gardner in the penal sum of seven thousand ($7,000) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 21st day of April, A. D. 1886.

The condition of the above obligation is such that whereas the said Geo. C. Richardson, Chas. S. Smith, Geo. K. Guild, Ralph L. Cutter, and Harrison Gardner did, on the 20th day of April, A. D. 1886, in the circuit court of the United States in and for the northern district of Illinois, and of the March term thereof, A. D. 1886, recover a judgment against James O. Cleaveland, Cornelius B. Cummings, and Washington Libbey, surviving partners of the firm of Cleaveland, Cummings & Woodruff, for the sum of five thousand five hundred and twenty-nine dollars and forty-five cents, besides costs of suit;

112 And whereas the said James O. Cleaveland, Cornelius B. Cummings, and Washington Libbey have prosecuted a writ of error to the Supreme Court of the United States to reverse the said judgment:

Now, therefore, if the said James O. Cleaveland, Cornelius B. Cummings, and Washington Libbey shall duly prosecute their said writ of error with effect and moreover pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against them in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

COLUMBUS R. CUMMINGS. [SEAL.]
O. L. GAITHER. [SEAL.]
GEO. A. IVES. [SEAL.]

Approved April 22, 1886.
W. Q. GRESHAM.

Endorsed: Filed Apr. 22, 1886. Wm. H. Bradley, clerk.

113 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner are the plaintiffs and James O. Cleaveland, Cornelius B. Cummings, and Washington Libbey, survivors of Charles W. Woodruff, deceased, are the defendants, as the same appear from the records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this tenth day of June, 1886.

Seal of Circuit Court
U. S., Northern Dist.
Illinois, 1855.

WM. H. BRADLEY, *Clerk.*

114 UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between George S. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner, plaintiffs, and James O. Cleaveland, Cornelius B. Cummings, and Washington Libby, defendants, in an action of assumpsit, a manifest error hath happened, to the great damage of the said James O. Cleaveland, Cornelius B. Cummings, and Washington Libby, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1886, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of April, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 110th year.

Seal of Circuit Court
U. S., Northern Dist.
Illinois, 1855.

WM. H. BRADLEY,
Clerk of the United States Circuit Court, Nor. Dist. of Ills.

[Endorsed:] Supreme Court of the United States. James O. Cleaveland, Cornelius B. Cummings, and Washington Libby, plaintiffs in error, *vs.* George S. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner, defendants in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

115 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

To George S. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein James O. Cleaveland, Cornelius B. Cummings, and Washington Libby are plaintiffs in error and George S. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham this 22nd day of April, in the year of our Lord one thousand eight hundred and eighty-six.

WALTER Q. GRESHAM.

Service of above citation is accepted this 22nd day of April, A. D. 1886.

DOOLITTLE & McKEY,
Attorneys for Def'ts in Error.

[Endorsed:] 19193. Supreme Court of the United States. James O. Cleaveland *et al.*, pl'ffs in error, *vs.* Geo. C. Richardson *et al.*, def'ts in error. Citation to October term, A. D. 1886.

116 In the United States Circuit Court for the Northern District of Illinois.

GEORGE C. RICHARDSON, CHARLES S. SMITH, George K. Guild, Ralph L. Cutter, and Harrison Gardner, Copartners, &c.,
vs.
JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS, Charles W. Woodruff, and Washington Libby.
} Gen. No. 19193.

It is hereby stipulated and agreed by and between the parties hereto that the above cause may be heard and decided by the court without the intervention of a jury, the right to a trial by jury herein being hereby expressly waived by the respective parties.

April 13th, 1886.

DOOLITTLE & McKEY,
Pl'ffs' Att'ys.

M. W. FULLER,
Defendants' Attorney.

(Endorsed:) Filed Ap'l 13, 1886. Wm. H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the stipulation filed in said court on the 13th day of April, A. D. 1886, in the cause wherein George C. Richardson *et al.* are the plaintiffs and James O. Cleaveland *et al.* are the defendants, as the same appears from the original thereof now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 30th day of October, A. D. 1888.

WM. H. BRADLEY, *Clerk.*

117 In the Supreme Court of the United States, of the October Term, A. D. 1888.

JAMES O. CLEAVELAND *et al.*
vs.
GEORGE C. RICHARDSON *et al.*

It is hereby stipulated and agreed that the foregoing paper, being a certified copy of a stipulation filed in the United States circuit court for the northern district of Illinois, may be filed in this Court and made a part of the record in the above-entitled cause.

GREGORY, BOOTH & HARLAN AND
S. S. GREGORY,
Att'ys for Pl'ffs in Error.
DOOLITTLE & McKEY,
Att'ys for Def'ts in Error.

118 [Endorsed:] Sup. Court U. S. 1888, Oct. term. No. 399. Jas. O. Cleaveland *et al.*, pl'ffs in error, *vs.* Geo. S. Richardson *et al.* Stipulation and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Dec. 15, 1888. James H. McKenney, clerk.

Endorsed on cover: N. Illinois C. C. U. S. No. 399. James O. Cleaveland, Cornelius B. Cummings, and Washington Libby, plaintiffs in error, *vs.* George S. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter, and Harrison Gardner. Filed October 5, 1886.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, A. D. 1889.

NO. 125.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS AND WASHINGTON LIBBY,
Plaintiffs in Error,

vs.

GEORGE S. RICHARDSON, CHARLES S. SMITH, GEORGE R. GUILD, RALPH L. CUTTER AND HARRISON GARDNER,
Defendants in Error.

Error to Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument for Plaintiffs in Error.

STATEMENT.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois. The case, which was a suit in assumpsit, was tried below by the court, a jury having been waived by agreement of the parties. (*Record, p. 47.*) The court gave judgment for defendants in error.

The facts, as they appear from the findings of the court, are as follows:

James O. Cleaveland, Cornelius B. Cummings and William F. Shelley, on the 31st of December, 1881, formed a limited copartnership for the transaction of a wholesale mercantile business in Chicago. The name of the firm was "Cleaveland, Cummings & Shelley." Of this firm Washington Libbey was a limited partner. In May, 1883, Shelley retired from the firm and Charles W. Woodruff took his place. The name of the firm then became "Cleaveland, Cummings & Woodruff." It was the intention of the parties to continue the business as a limited partnership, but, as the court finds, the steps required by the statute of Illinois to effect that purpose were not properly taken. (*Record, p. 38.*)

During the months of August and September, 1883, Richardson, Smith & Co., the defendants in error, sold to Cleaveland, Cummings & Woodruff, merchandise amounting in value to $9,355.86. At the same time they held two promissory notes executed by the latter firm representing an indebtedness amounting to $2,769.39, making the aggregate of their claim against the plaintiffs in error, $12,125.25. (*Record, p. 38.*)

In October, 1883, Libbey paid to Jas. O. Cleaveland $1,000, for his interest in the firm, and at the same time there was delivered to Cleaveland the following paper (*Record, p. 38*):

> The copartnership heretofore existing between James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff and Washington Libbey, under the firm name of Cleaveland, Cummings & Woodruff, has this day been dissolved by mutual consent, and such dissolution to take effect November 1, 1883. All accounts and indebtedness due the late firm of Cleaveland, Cummings & Woodruff, must be paid to Cummings, Woodruff & Brown, successors to Cleaveland, Cummings & Woodruff, by whom all liabilities of the late firm must be paid, and said Cleaveland held harmless therefrom.
>
> Dated Chicago, Illinois, October 30, A. D., 1883.
>
> (Signed) JAMES O. CLEAVELAND.
> C. B. CUMMINGS.
> CHARLES W. WOODRUFF.
> WASHINGTON LIBBEY.

At the time of the signing of this paper it was the intention of the parties that the firm of Cummings, Woodruff & Brown should be formed, with Libbey as a special partner; but the plan fell through, although Cleaveland supposed that it had been formed when he sold out his interest. (*Record, p. 39.*)

On November 14, 1883, the firm of Cleaveland, Cummings and Woodruff suspended, with liabilities amounting to $640,000, of which about $179,000 was owing for money that had been borrowed, and was unsecured; and about $461,000 for merchandise. The assets were sufficient to pay the borrowed money in full, and not quite 60% per cent. upon the merchandise debts.

The larger part of the borrowed money had been obtained from the Union National Bank of Chicago. One of the directors of this bank was Columbus R. Cummings, who was also a brother of the Cummings of the firm of Cleaveland, Cummings and Woodruff. Columbus R. Cummings had introduced the firm at the bank, and felt in honor bound to see that the bank suffered no loss. So on the day of the suspension of the firm he bought all of its bills receivable, notes and accounts, and gave in payment two promissory notes, one for $110,000, which was delivered to the bank in payment of the money borrowed from it; and one for $91,110.43, which was delivered to the firm of Cleaveland, Cummings & Woodruff. (*Record, p. 39.*)

Shortly afterward Cleaveland, Cummings & Woodruff sent J. J. Knickerbocker, as their attorney, to New York to interview their creditors. He proposed to them to pay sixty cents on the dollar of their claims. At the time the application was made to defendants in error to settle on that basis, some of the other creditors had already settled at that rate, and some had not. The court finds that Knickerbocker explained to defendants in error that it was intended to pay the borrowed money in full, and that the remaining assets would not be sufficient to pay quite sixty per cent. of the remaining indebtedness ; that at this interview between Knickerbocker and the defendants in error, the question of Libbey's liability as a member of the firm was spoken of, and that Knickerbocker stated that he had not had an opportunity to examine into that matter, and was not sufficiently informed to say whether Libbey could make a successful defense or not; but that was a question that they could investigate for themselves. On the same occasion one of the firm remarked to the attorney that they had sold no goods to the plaintiffs in error on the strength that Libbey was more than a special partner, and that they had given the firm no credit on the faith that Libbey held any relation to it other than that of a special partner ; that Libbey had lost his special capital, and that they had no desire to make him pay more. The court finds that it does not appear from the evidence that Knickerbocker communicated to them the fact that Libbey had signed the paper quoted above, or that he made any statement as to Libbey's financial ability to pay the debts of the firm. (*Record, pp. 39, 40.*)

The defendants in error at first refused to accept the offer of sixty cents on the dollar, but on the 29th day of December, 1883, upon the receipt of the sum of $7,275.15, which was sixty per cent. of their claim,they agreed to make the settlement, and executed and delivered to Knickerbocker the following instrument (*Record, p. 40*):

> For and in consideration of the sum of seven thousand two hundred and seventy-five and 15/100 ($7,275.15) dollars, to us in hand paid by John J. Knickerbocker, of Chicago, Ill., the receipt whereof is hereby acknowledged and confessed, and (we) have sold, assigned, transferred and delivered, and do hereby sell, assign, transfer, set over, and deliver to said Knickerbocker, his

heirs, executors administrators and assigns, the above and foregoing claim in our favor and against the late firm of Cleaveland, Cummings & Woodruff, and all other claims and demands which we now have or might or could have against the said Cleaveland, Cummings & Woodruff by reason of the happening of any matter or thing from the beginning of the world to the day of the date hereof, without recourse to us, and authorize and empower said Knickerbocker to sue for, collect, settle, compound and give acquittance therefor as fully as we could do in person.

In witness whereof we have hereunto set our hand and seal this 29th day of December, 1883.

GEORGE C. RICHARDSON & CO. [Seal.]
Per WALTER M. SMITH. [Seal.]

Attached to this instrument were the two promissory notes referred to above (which did not mature until the following month), together with a statement of their account against the defunct firm. (*Record, p. 41.*)

At the same time, Woodruff, one of the members of the firm, delivered to the defendants in error the following paper (*Record, p. 41*):

JOHN J. KNICKERBOCKER. JESSE HOLDOM.
KNICKERBOCKER & HOLDOM, Attorneys at Law,
164 LaSalle St.
CHICAGO, ———, 188—.

In consideration of a compromise this day made by Messrs. Geo. C. Richardson & Co. and Messrs. Jay, Langdon & Co., of New York City, of their respective claims against the late firm of Cleaveland, Cummings and Woodruff, of Chicago, Ill., the said Cleaveland, Cummings & Woodruff stipulate and agree not to pay voluntarily to any of their creditors holding claims in excess of one thousand dollars to exceed sixty per cent. on the dollar in settlement. Providing, however, that the payment of attorneys' fees and court costs in all cases where suits have been heretofore or may hereafter be commenced shall not be considered as an evasion or violation of this agreement.

CLEAVELAND, CUMMINGS & WOODRUFF.

Dec. 29th, 1883.
6—399.

In April, 1884, all the merchandise debts of the firm had been settled and released, at the rate of sixty cents on the dollar, except about $88,000. One of the creditors that had not released, was the firm of Vietor & Achelis (whose claim amounted to about $12,000).

They had refused a settlement on that basis, and had brought an attachment suit against plaintiffs in error, which was about to be tried. Before the trial, however, the attorney of Cleaveland, Cummings & Woodruff paid Vietor & Achelis sixty cents on the dollar of their claim, and the latter thereupon released, but at the same time he gave his check to the attorneys of Vietor & Achelis for twenty-five per cent. of their claim. The attorneys remitted twenty of the twenty-five per cent. to Vietor & Achelis. The court finds that the payment to the attorney of Vietor & Achelis was a cover, under which they were to receive more than sixty per cent. on their claim, and that it was made by agreement that they should receive eighty per cent. (*Record, p. 42.*)

On these findings the court rendered judgment for the defendants in error for the balance due on their original claim.

It is to review certain questions of law, upon which the judgment was based, that the writ of error was taken to this court.

ASSIGNMENT OF ERRORS.

1. The court erred in admitting in evidence the written paper set forth in the 5th finding, and dated October 30th, 1883.

2. The court erred in admitting in evidence the paper signed Cleaveland, Cummings and Woodruff, dated December 29, 1883, and set forth at the end of the 9th finding.

3. The court erred in finding the payment to Vietor & Achelis, as set forth in the 10th finding, to have been a voluntary payment.

4. The court erred in rendering judgment for the full balance of the claim of plaintiffs.

5. The court erred in finding the issues for the plaintiffs, and in not finding the issues for the defendant.

ARGUMENT.

I.

It is contended, on the part of the plaintiffs in error, that the assignment set forth in the 9th finding was valid and is still subsisting.

It will doubtless be contended, on the part of the defendants in error, that the assignment by them of the whole of their claim against the defunct firm was without consideration, and therefore cannot be availed of as a defense to a suit to recover the balance. This point was set up in their second replications (*Record, pp. 18, 21*) to the third and fourth pleas; to which replications a demurrer was filed (*Record, p. 30*), which was sustained by the court (*Record,* *p. 36*). To the order of the court sustaining the demurrer, no exception was taken nor any appeal; and, under the pleadings, therefore, as they now stand, that question has been adjudicated, and is not in the case. But, even if it could properly be urged in this court, it would be sufficient to say, in reply, that the instrument relied on here is under seal. And it is well settled that the acceptance of a smaller sum in payment of a larger, when evidenced by a instrument *under seal*, may always be pleaded in bar of a suit to recover the balance.

Kingsley v. *Kingsley*, 20 Ill. 205.

The rule, as stated in Co. Litt. 212 b, is that: "If the "obligee or feoffee do at the day receive part, and thereof "make an acquittance *under his seal* in full satisfaction of "the whole, it is sufficient by reason the deed amounteth to "an acquittance of the whole."

This rule has never been departed from.

Potter v. *Green*, 6 Allen, 526.

Even where the instrument is not under seal, the objection that it is not good for want of a consideration, is purely a technical one, and one that is now but little favored. And for this reason courts have always held that the slightest new or different consideration will take the case out of the rule. And the payment of a debt before it is due has frequently been held to be a sufficient new consideration. Indeed, no rule of law is better settled than that the payment of a less sum and its acceptance in full discharge, when it is not yet due, is a good discharge of the whole.

2 Parsons on Contracts, 619.
Brooks v. *White*, 2 Met. 283.
Goodnow v. *Smith*, 18 Pick. 414.
Sibree v. *Tripp*, 14 M. & M. 23.

In the case at bar it will be noticed that in addition to the consideration imported by the seal, there is the further consideration that part of the debt assigned was not due at the date of the assignment as is shown by the original evidences of debt attached to it (*Record, p. 41*); and the payment of a part of the indebtedness represented by the promissory notes, before they became due, was a benefit to the creditor, and affords a sufficient new consideration to support the assignment and to make it valid. This rule is so well settled by abundant authorities that there is no occasion further to elaborate it.

But it is anticipated that counsel for defendants in error will not seriously attack the obligation of the instrument, or its validity as a subsisting contract, on the ground of a want of consideration.

It was contended below by counsel and it is presumed will be contended here:

1. That the assignment is voidable because of an alleged misrepresentation by Knickerbocker in his interview with defendants in error.

2. That plaintiffs in error have broken their alleged agreement not to pay voluntarily to any creditor more than sixty per cent.

II.

The first of these two points will, upon examination, appear to be scarcely worthy of consideration, and it is adverted to only in the anticipation that counsel for defendants in error will endeavor to attach some importance to it.

did fully. He told them that he did not know whether Libbey could make a successful defense or not, but that they must investigate that question for themselves. And the presumption is that they did investigate, for they did not sign the instrument until nearly a month and a half after this interview. They had plenty of time to consider and investigate the whole matter, and to take advice upon the subject. At any rate, if they intended to make any point on Libbey's liability, or to make the assignment only on condition that he was not liable, it was their duty, having been put in possession of the doubt, to have made it then. They cannot come in afterwards and raise the point, when they were distinctly and in terms put on guard about it and told to investigate it if they desired to do so.

But the whole question is disposed of by the finding of the court (*Record, p. 40*), that they told Knickerbocker at that interview:

> That they had sold no goods to the defendants on the strength that Libbey was more than a special partner; that no credit had been given to the firm on the faith that Libbey sustained any other relation to it; that Libbey had lost his special capital, and *that they had no desire to make him pay more.*

After such a statement as this, to say that Knickerbocker or the plaintiffs in error were guilty of any fraudulent concealment is simply absurd. The claimants themselves thought that Libbey was a special partner, and had conducted business with, and extended credit to, the firm only on that basis.

III.

But the court, in the finding quoted above, also found as follows:

> It does not appear, however, from the evidence, that the defendants or their attorney communicated to the plaintiffs the fact that Libbey had signed the instrument in writing referred to in the fifth finding, or that he made any statement as to Libbey's financial ability to pay the debts of said firm.

Both of these points may be disposed of in a very few words.

The 6th finding (*Record, p. 39*) recites that it was the intention, at the time the paper referred to was signed, to form a new partnership — Cummings, Woodruff & Brown — of which Libbey was to be a special partner; but that it was never formed. And the paper referred to in the fifth finding, signed in contemplation of there being a new firm, merely provides that the liabilities of the old firm should be assumed — not individually by the signatories to the paper — but by the new *firm.* But the paper has not now, nor did it have at the time of the assignment made by defendants in error, the slightest force, for the simple reason that the new firm, upon which the liabilities of the old were to be put, was never formed.

The attempt, therefore, to attribute to that paper the working of any change in Libbey's liability must fail. Even if the paper had become operative, by the formation of the new firm, it would simply have put the liabilities of the old firm upon the new, of which Libbey was to be a *special partner with a limited liability.*

Moreover, even if the paper had become operative, it could not be taken advantage of by these creditors. It could only be enforced by the old firm. For it is a rule well settled that an incoming partner is not liable for debts incurred by the firm prior to his admission. He may undoubtedly make himself liable, " but," as said in Lindley on Partnership, p. 208, " it must be borne in mind, that, " even if an incoming partner agrees with his copartners " that the debts of the old shall be taken by the new firm, " this, although valid and binding between the partners, is, " as regards strangers, *res inter alios acta*, and does not " confer upon them any right to fix the old debts upon the "new partner. In order to render an incoming partner "liable to the creditors of the old firm, there must be some "agreement, expressed or tacit, to that effect, entered into "*between him and the creditors*, and founded on some sufficient consideration."

The court finds that Cleaveland thought that the new firm had been formed, and as to him the paper referred to may have some force, but as to these claimants, or any other creditors, not the slightest. Indeed, even if Libbey, by signing the paper, had expressly agreed that he would individually become liable for the debts of the old firm, such an agreement would not avail creditors. It could only be enforced by the old firm. As to creditors, it would be *res inter alios acta.*

Serviss v. *McDonnell*, 107 N. Y. 260.

As to the finding that it does not appear that Knickerbocker made any statement at the interview as to Libbey's financial ability to pay the debts of the firm, it may be said that the finding of the court is not that Libbey was a man of large wealth, but only that he was *reputed* to be.

They asked no question of Knickerbocker on that point. If they had, he would, undoubtedly, have given them such information as he had. Nor did they, during the month and a half that intervened between the interview and the settlement, make any inquiry of Libbey. If they had they would, doubtless, have been fully informed as to his financial standing. Knickerbocker did not think to make any statement; nor did they think either at the interview or afterwards to make any inquiry, because they all, including Libbey, thought that the latter was a special partner. The whole question of his liability depended upon his relation to the firm. They had, as they themselves confessed, dealt with the firm on the supposition that he was a special partner. They thought that was his status, and they told Knickerbocker that they had no desire to hold him as a general partner. Clearly then, the omission of Knickerbocker or plaintiffs in error, when all parties thought that Libbey was a special partner, to volunteer the statement that he was a man of large wealth, if this be so, was neither misrepresentation nor concealment. If he had been a special partner, as all thought he was, the amount of his wealth was immaterial to any point under discussion at that interview.

In *Graham* v. *Meyer*, 99 N. Y., 611, it was held that a compromise made by a debtor may not be assailed on the ground that he failed to make disclosures as to his financial condition. When he is not questioned in regard thereto, and does nothing to mislead, he is not bound to make any such disclosure. The court say:

> But the defendant was not bound to make any disclosure of his financial condition. He was not asked to make any. He made no misrepresentations, and did nothing to mislead Graham, or prevent him from inquiring, or to throw him off his guard. They negotiated at arm's length. The defendant was in no trust or confidential relation with him. It is true that he had made an assignment, and had thereby created a trust for Graham's benefit. But he was not the trustee. He bore the simple relation to him of debtor, and he had the right to make the best compromise with him he could, using no fraud or culpable artifice to accomplish the result. Each party to such a compromise has the right to the advantage which his superior skill, foresight and knowledge may give him. The business of the world can be conducted on no other basis. If either party desires information from the other he must ask for it, and then he must not be misled or deceived by answers given.

This rule is nothing more nor less than an exact statement of the rule of action by which men are guided in negotiating a compromise. They should answer no inquiry by a falsehood, and yet, it is not in human nature to volunteer information that would lead to an increase in the terms of settlement. And creditors would not expect them to do so. Perhaps, however, as a rule of law it is too strongly put. But, however that may be, it would seem to be a plain proposition, when all parties were in doubt as to Libbey's liability as a general partner—and the finding is a little stronger than that, for it means that they *thought* he was a special partner—that Knickerbocker's duty was ended when he informed them of the doubt and told them to investigate it.

And concealment or fraud is not to be inferred from the finding that Knickerbocker made no statement about Libbey's alleged wealth; for the importance of that fact, depended entirely upon his relations to the firm as a special or general partner. And, in addition to this, they told Knickerbocker that they had done business with the firm only on the theory that he was a special partner and that they had no desire to hold him as a general partner. After such a statement, to say that it was Knickerbocker's duty to make any statement about Libbey's means, would be to hold that he was under an obligation to persuade them against their own conviction, and desire to endeavor to make Libbey liable.

IV.

The main point, however, and the only point that seems at all worthy of discussion in this case, is the claim of defendants in error that the plaintiffs have broken their alleged agreement not to pay voluntarily to any creditor more than sixty cents on the dollar. This was the point upon which counsel chiefly relied below, and was the point upon which the judgment of the court was based.

It is earnestly contended, however, that there has been no breach of the agreement on the part of the plaintiffs in error.

The facts concerning the payment which is alleged to constitute a breach of the agreement are set forth in the 10th finding. (*Record, p. 42.*) It appears, from that finding, that in April, 1884, nearly five months after the defendants in error had executed the assignment, a settlement was effected with Vietor & Achelis. The latter had refused to settle on the same basis as the other creditors, and had brought suit *in attachment* to enforce their demand. And the suit to which there was no defense was about to be tried.

It was under such circumstances that the settlement was made. They were paid sixty cents on the dollar, and thereupon they assigned their claim ; but at the same time, the court finds, Knickerbocker gave his check to their attorneys for twenty-five per cent. of the amount of the claim. Of this twenty-five per cent. the attorneys afterward remitted twenty to Vietor & Achelis ; and the court finds that this was a cover under which the latter were to receive eighty per cent.

There was upon the evidence abundant room for doubt as to whether the plaintiffs in error, or their attorney, knew that Vietor & Achelis were to receive the twenty per cent. The court, however, has found that it was a cover under which they were to receive an additional amount; and this finding, we take it, is conclusive on this court. But there is, however, a clear distinction between the *manner* of making the payment and *the payment itself*. The court finds that the manner of the payment was a cover under which Vietor & Achelis were to receive eighty per cent. But as to the payment itself, the court certifies (*Record, p. 44*), that the evidence adduced by the plaintiffs in error tended "to show that no "payment was made to either (any) of the mercantile "creditors by *preference* or *with a view to discriminate* "between one of said creditors and another."

It may be, therefore, that the payment was made in the manner stated in order to avoid any question arising at the instance of a captious and litigious creditor. But, as the court certifies, the evidence tended to show that the payment itself was not made with a view to discriminate or give a preference. But the court below held as a strict matter of law (*Record, p. 44*), irrespective of any intention on the part of the debtor to give a preference, that any payment over sixty per cent. to any creditor was voluntarily made *unless the claim had gone to judgment* (*Record, p. 44*). To this ruling an exception was taken, and it is proposed here to show, upon reason and authority, that it was erroneous.

The precise question was determined in the case of *Carey* v. *Barrett*, 4 C. P. D. 379. In that case a composition agreement had been entered into by which the creditors agreed to accept 10s. in the pound in satisfaction of their debts. The instrument contained a provision that the whole of the creditors should receive "not exceeding a like sum in discharge of their debts." One of the creditors, who did not sign, had brought a suit against the debtor to recover the amount of his claim. The suit was on the eve of trial, and the debtor, having no defense, paid the debt the day before the trial. The plaintiff sued to recover the balance of his claim, alleging a breach of the agreement. There was some question in the case as to whether the words above quoted were intended to apply to creditors that had not signed the composition, but Lord COLERIDGE, who delivered the opinion, held, that, even if the instrument was intended to apply to all the creditors, nevertheless the payment was made under pressure, and was not such as would vitiate the contract. And it is distinctly held that, though the debtor did not wait until judgment had gone against him, *it was nevertheless a payment under process of law.*

This rule, it is submitted, is both reasonable and equitable. To insist that the debtor in such a case must wait for judgment against him and incur the costs of such proceedings, in order to keep within the terms of the contract, would be extremely technical and without any sound reason.

In the case cited the debtor paid the claim in full; but the case at bar is much more within the rule laid down by Lord COLERIDGE, because here the debtor saved twenty per cent. by compromising before it had gone to judgment. It is not pretended by counsel that there was any defense to the suit, and it was a suit *in attachment*. The presumption is that Vietor & Achelis had laid hold of some of the assets of the firm under the attachment writ. And judgment was immediately impending. An endeavor had been made to get them to settle at sixty cents, but, for nearly five months after defendants in error had settled, Vietor & Achelis were still holding out. There is a strong presumption that during this time defendants in error were active in attempting to get a settlement at sixty cents, but Vietor & Achelis had refused, and would take nothing less than eighty. Under such circumstances to hold the payment was "voluntary," would seem to be an extremely unreasonable construction of that term. The word as used in the agreement would seem to imply an original and affirmative action upon the part of the debtor, uninfluenced by any pressure or coercion. If a compromise made in view of an immediately impending judgment in a suit in attachment, to which there is no defense, is not substantially a payment under process of law, as held by Lord COLERIDGE, it is clearly a payment under coercion. And, if coercion be too strong a term, it is certainly a payment under pressure, and " under pressure " is certainly incompatible with " voluntarily."

In *R. R. Co.* v. *Coal Co.*, 79 Ill. 121, the coal company had a contract with the railroad for carrying its coal at a fixed rate of freight. After three years of performance under the contract, the railroad company raised the rates. There was no other outlet for the coal company, and it was compelled therefore to pay the advanced charges. In a suit brought to recover the difference, the court held that the payment could not be called voluntary, but that it was made under a sort of moral duress; and a recovery was allowed.

See also *Radich* v. *Hutchins*, 95 U. S. at p. 213.

What the alleged contract means is, that they would not pay to any creditor in a voluntary compromise out of court more than sixty per cent.; but it certainly was not intended to mean that, when a creditor had attached, and was about to recover a judgment in attachment for the full amount of his claim, a settlement effected under such circumstances by which twenty per cent. was saved for the other creditors, would be a violation of the agreement. Plaintiffs in error had agreed to pay their creditors sixty cents on the dollar, and, in order to enable them to carry out the agreement, they had come to some settlement with this Vietor & Achelis. The latter refused sixty per cent. and demanded not less than eighty. Under such circumstances plaintiffs in error owed it as a positive duty to the other creditors to make the best terms they could. Indeed, if they had waited until the judgment had gone against them, and then they had been compelled to pay it in full, when they might have settled it for twenty per cent. less, such action might, with much more reason, have been called a voluntary payment. Creditors might in such case complain with some justice. But not so when plaintiffs made the best terms that they could, and saved twenty per cent. on the claim for the other creditors by doing so.

It is observed by Lord COLERIDGE, in the case above cited, at p. 382: " I am not aware of any distinct authority " for it, but I believe that the general understanding of the " profession has been that a payment in excess made after- " wards will not avoid the composition unless made in pur- " suance of a previous understanding."

In *in re Sturges*, 8 Biss. 79, Sturges, being financially embarrassed, made a proposition to his creditors to pay them fifty cents on the dollar of all claims over $100. The proposition was accepted by all the creditors, and they were settled with on that basis. One of the creditors accepted the proposition on the written understanding, "*that none of the other creditors, including banks, should receive better terms.*" Afterward, Sturges, of his own choice, paid some of his creditors in full, being prompted to do so simply because he felt that he was under a moral obligation to pay all of his debts in full. Afterwards he became a bankrupt, and the creditor above mentioned filed a claim against his estate for the balance of his demand, alleging a breach of the contract. Judge Blodgett, who delivered the opinion, held that there had been no violation of the agreement, and the claim was not allowed.

The theory of all the numerous cases upon this subject is, that a debtor may not secure the signature of one creditor to a composition by falsely stating that another creditor has signed, or had agreed to sign, and to accept a certain amount, when in reality the debtor had agreed to give him a greater amount. That would be an affirmative fraud, and would undoubtedly vitiate the composition. But there was no such state of affairs in the case cited above, or in the case at bar. In the latter case it is not alleged that there was any secret agreement that Vietor & Achelis were to be paid more. Nor did defendants in error assign their claim on the faith that Vietor & Achelis had agreed, or would agree, to accept the same percentage. On the contrary, they acted independently, and without regard to what any other creditor might agree to accept. They were not cheated into assigning their claim, upon the supposition that Vietor & Achelis had agreed to accept the same amount. Not at all. Nevertheless, it may be said, plaintiffs in error agreed that they would not, voluntarily, pay to Vietor & Achelis, or any other creditor, more than sixty per cent. So they did. But can any one say, upon this record, that plaintiffs in error *desired* to pay them more; that they went to them and expressed a *wish* to pay them more; that they sought them out for the purpose of paying them a greater amount? Were they anxious to get rid of their money? Had they any money to spare? Did they make the payment of their own choice and free will? By no means. And yet that is what the word " voluntarily" means.

But they did not pay it voluntarily. On the contrary, they paid nothing to Vietor & Achelis until nearly five months after defendants in error were paid, and then only under the coercion, compulsion and duress of a suit in attachment, just on the eve of judgment, which left them no choice, no free will, and no option in the matter except to accept the best terms that they could get.

In the foregoing observations we have discussed the matter as if the payment to Vietor & Achelis had been made by the plaintiffs in error, and have endeavored to show, that, even if they had made the payment, it was not, under the circumstances detailed in the 10th finding, a voluntary payment within the meaning of the alleged agreement. As a matter of fact, however, and to this the attention of the court is especially directed, plaintiffs in error did not pay to Vietor & Achelis the additional twenty per cent. The finding of the court is that "the attorney of Cleaveland, Cummings & Woodruff paid to Vietor & Achelis *sixty per cent.* on the dollar of their claim;" and thereupon they released their claim. But the court was careful to find, as was in accordance with the fact, that, "At the same time said attorney of Cleave-"land, Cummings & Woodruff gave *his* check (which was "afterward paid) to the attorneys of Vietor & Achelis for "twenty-five per cent., of which twenty per cent. was "afterwards remitted," etc. (*Record, p. 42.*)

In making these quotations from the 10th finding, we do not intend a mere play upon words. The actual fact is, as shown by the record, that the additional twenty per cent. paid to Vietor & Achelis, was not paid by Cleaveland, Cummings & Woodruff, nor did the money come out of the assets of that firm. The assets were not quite sufficient to pay to each of the creditors sixty cents on the dollar (*finding VII., Record p. 3*), and each of the creditors received that amount (*Record, p. 44*); and therefore the additional amount that went to Vietor & Achelis did not come from the assets of the firm ; and it is presumed that counsel will not deny that the additional twenty per cent. came out of the pockets of Columbus R. Cummings, who was not a member of the firm, and that he paid it in order to save his brother, who was a member of the firm, and to get him out of financial difficulties. At any rate, and this counsel cannot deny, for it is established by the record, the money was paid, not by Cleaveland, Cummings & Woodruff, but by the check of Knickerbocker, and the amount of it came from a source outside of the assets of that firm.

Out of the assets, defendants in error received their exact and equal proportion. Of those assets there was an exact, equal and just distribution among all the creditors. Each creditor received of the assets sixty per cent. on the dollar of his claim, and no creditor received a single penny more. The agreement was given and accepted only as an assurance that there would be an equal distribution of the assets. That is all that it means. And, that being so, defendants in error cannot justly complain if one creditor received from a *source outside of the assets* twenty per cent. more, and that only upon the compulsion arising from a suit in attachment, in which judgment was inevitably and immediately impending.

The whole meaning, and the only meaning, of the agreement is, that Cleaveland, Cummings & Woodruff would distribute their assets fairly among their creditors, including the defendants in error. And this they did. In what way, then, have defendants in error been harmed?

The agreement is that the plaintiffs in error would not pay to any creditor more than sixty per cent. But it does not say what shall be the measure of damages for a breach of that provision. And when these creditors received their full and just proportion of the assets, it would seem to be a case of *damnum absque injuria*, if another creditor receives from another source an additional amount. Having received their just proportion of the assets, how is it possible that the payment to another creditor of an additional per centage by a person not connected with the firm, and, from a source other than its assets, could constitute an injury?

It is confidently submitted, that a payment made under the circumstances detailed in the 10th finding, where no previous understanding is even pretended, and made from a source outside of the assets of the firm, does not from any point of view, either in law or equity, or good conscience, constitute a breach of the agreement.

V.

In the foregoing pages we have endeavored to show that there has been on the part of the plaintiffs in error no breach of the agreement not to pay voluntarily to any creditor more than sixty cents on the dollar. If, however, the court, upon consideration of the question, is of the opinion that a payment of more than that amount made to a creditor on the eve of the trial of a suit in attachment to which there was no defense, was a voluntary payment within the meaning of that word as used in the agreement, then it is submitted that the court below erred in giving judgment to the plaintiffs below for the full balance of their claim. Judgment should have been given only for an additional twenty per cent., which was the amount of the additional percentage paid to Vietor & Achelis. But the court gave judgment for forty per cent. This was erroneous.

In discussing this question, it is necessary to recur to the assignment as well as to the pleadings in the case.

It is to be observed, in the first place, that the assignment is an instrument under seal, and that it is absolute in form, and contains no conditions, or exceptions, or reservations. The agreement, on the other hand, is not under seal, and its admission in evidence was objected to on the ground that, when an instrument under seal is set up, the defendants in error could not set up an exception to it by *parol*. This rule is so well settled that it needs no citations from the authorities to support it.

And it follows, therefore, that the agreement cannot be availed of as a part of or an exception to or a condition of the assignment. The assignment is absolute and the remedy, if any, can only be by suit upon the agreement.

In *Kingsley* v. *Kingsley*, 20 Ill. 205, a release under seal was executed, the debtor promising to get the notes which formed the consideration of the release indorsed by a third person. This he attempted to do, but failed. The court held that the release was, nevertheless, good against the releasor, and that his remedy was on the contract.

In this case plaintiffs below accepted the money, and gave an absolute assignment to Knickerbocker, of all their claims and demands, turning over to him also two promissory notes, and an account stated. But they took back an agreement that the defendants below would not voluntarily pay to any creditor more than sixty cents on the dollar. Clearly, then, if they have any remedy, it can only be by suit upon the agreement.

Again, as said above, the assignment was absolute, and had attached to it two promissory notes, as well as a statement of account of the unpaid portion of the original debt. The *title* to the notes, and the account stated, thus passed by the assignment to Knickerbocker. Now, assuming that the assignment was not procured by fraud, and this, we think, has been demonstrated, it is clear that the plaintiffs below could not sue upon the original demand and evidences of debt so long as the assignment had not been rescinded. They cannot stand in the position of suing upon notes and accounts which had been assigned, and to which they had no title. The remedy, therefore, could only be upon the agreement, and the judgment of the court below cannot be supported by the issue joined on the common counts, for the reason that the original demand has been assigned absolutely and without condition.

Now, as to the pleadings, it will be seen, by referring to the analysis, which is appended to this brief for the convenience of the court, that the court below, in sustaining the demurrer to the second and third replications to the third and fourth pleas respectively, has adjudicated, first, that the reply of a want of consideration for the discharge of the balance of the original claim cannot be availed of; and, secondly, that the agreement is no answer to the assignment, and cannot be availed of as a part of or exception to it.

The only other issue left in the case is that raised by the fourth replications to the third and fourth pleas.

The third plea of the defendants below sets up the assignment of the plaintiffs' claim to Knickerbocker. The fourth plea of the defendants below sets up a satisfaction and discharge of the indebtedness. To these pleas the plaintiffs below replied, by way of confession and avoidance; confessing, in the one case, the assignment to Knickerbocker, and, in the other, the satisfaction and discharge, but setting up by way of avoidance an agreement by the defendants below to pay to plaintiffs below *as much on the dollar as they paid to any other creditor*, and alleging payments to divers other creditors of one hundred cents on the dollar. The proof, however, failed to show the payment in full to any creditor, but did show the payment of an additional twenty per cent. to Vietor & Achelis.

The agreement adduced in evidence contains no provision that the defendants below would pay to these claimants as much as they paid to any others, as set up in the replications; and its admission in evidence was objected to on the ground of variance. If it was admissible at all, it was only on the ground that its legal effect was properly stated in the replications; and in that case the damages, if recoverable at all, would be limited to such additional percentage over sixty, as the plaintiffs in error were shown by the evidence to have paid to any other creditor. And the proof shows such additional payment of twenty per cent. only. The court, however, rendered judgment for forty per cent. This was beyond all question erroneous. The fourth replications to the third and fourth pleas confess the assignment, and avoid it by insisting that the cause of action is not on the original claim, which had been discharged, but that the action is upon the alleged agreement. In other words, the case stands precisely as if the plaintiffs below had specially declared upon the alleged agreement as it is described in the fourth replications.

And the agreement as there described is that plaintiffs in error would pay to them as much as they paid to any one else. It seems clear, therefore, that, if the judgment can be sustained at all, it can only be for the amount of the additional percentage shown by the evidence to have been paid to Vietor & Achelis, and that was twenty per cent.

In conclusion, however, it is insisted again that there has been no breach of the agreement upon the part of plaintiffs in error not to pay voluntarily to any creditor more than sixty per cent.

Respectfully submitted,

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ANALYSIS OF PLEADINGS.

The figures denote the pages of the Record.

By the Plaintiff.	*By the Defendant.*
Common Counts (2).	1. Plea. General issue (11).
Similiter (17).	
Demurrer to second plea (17). Not heard or withdrawn. Replication traversing second plea (35).	2. Plea. In abatement. Denies copartnership (13).
Replications to third plea. 1. Traverse (17). 2. Admits compromise and assignment to Knickerbocker, but denies good consideration for discharge of balance (18).	3. Plea. Sets up assignment to Knickerbocker (14). Similiter to first replication. Demurrer to second replication (30) sustained (36).

3. Admits compromise, and avers agreement not to pay more than 60 %. Admits assignment, and avers payment of more than 60 % (18).	Demurrer to third replication (30) sustained (36).
4. Admits compromise, and avers agreement not to pay more than 60 %, and to pay plaintiffs as much as is paid to others. Avers payment to others of 100 % (20).	Rejoinder to fourth replication traversing averments, and concluding to country (31 and 32).

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4. Plea. Satisfaction and discharge (14).

Replications to fourth plea.

1. Traverse (21).	Similiter to first replication (31).
2. Admits compromise, and avers want of consideration for discharge of balance (21).	Demurrer to second replication (30) sustained (36).
3. Admits compromise, and avers agreement not to pay more than 60 %, and avers payment of more than 60 % (22).	Demurrer to third replication (30) sustained (36).
4. Admits compromise, and avers agreement not to pay more than 60 %, and agreement to pay plaintiffs as much as paid to others. Avers payment to others of 100 % (23).	Rejoinder to fourth replication traversing averments, and concluding to country (33).

SUPREME COURT OF THE UNITED STATES.

No. 125. October Term, A. D. 1889.

JAMES O. CLEAVELAND, CORNELIUS B. CUMMINGS AND WASHINGTON LIBBY, *Plaintiffs in error,* *vs.* GEORGE C. RICHARDSON, CHARLES S. SMITH, GEORGE R. GUILD, RALPH R. CUTTER AND HARRISON GARDNER, *Defendants in error.*	*Error to Circuit Court of the United States for the Northern District of Illinois.*

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT.

This suit was brought in the court below by the defendants in error against the plaintiffs in error, and Charles W. Woodruff (since deceased), as co-partners, doing business under the firm name and style of "Cleaveland, Cummings & Woodruff." It was brought in *indebitatus assumpsit* to recover an unpaid balance of an *undisputed* demand amounting December 23, 1883, to $4,850.10. They pleaded :

1. The general issue.
2. A special plea in abatement denying the co-partnership.
3. An assignment by the plaintiffs of their demand to one Knickerbocker.

4. Satisfaction and discharge upon the payment of sixty per cent. of plaintiff's demand.

Common law pleading still prevails in practice in the State courts of Illinois. The special pleas, therefore, were unnecessary, and, perhaps, even demurrable as amounting to the general issue.

Before the trial Woodruff died, and the cause went on against his survivors without a jury, before the court. On the trial no attention was given to the issues of law or fact made by the special pleadings. The case turned properly and wholly upon the general issue in *indebitatus assumpsit*, the sole issue being whether at the *time of the pleading* the defendants below *were* or *were not indebted* to the plaintiffs.

The court found that issue for the plaintiffs below, and rendered judgment for $5,529.45. (Rec. p. 43.)

The court made eleven findings of fact (Rec. pp. 38, 39, 40, 41 and 42), which we ask leave to read at length from the record without reprinting in our brief.

Summarized in few words, the essential facts found, are as follows: From May 1 to November 1, 1883, Washington Libby, one of the defendants below, and reputed to be a man of large wealth was a general common law dormant co-partner with "Cleaveland, Cummings & Woodruff." During that time the debt to the plaintiffs below, on which the suit was brought, was incurred. Libby intended to be a limited or special partner but he took no steps under the statute to limit his common law liability.

On the dissolution of the firm, the 30th of October, 1883, Libby bought out the interest of Cleaveland, and joined in and delivered to him a written agreement that a new firm contemplated to succeed the dissolving firm should pay all its debts and save him harmless therefrom.

After Libby had thus bought out and indemnified Cleaveland against the debts of the old firm, instead of forming the new firm, as contemplated, the defendants below, Libby, Cummings & Woodruff, suddenly stopped business, and *assumed the attitude of insolvency*. Instead of making a general assignment for the benefit of creditors they sold and assigned all bills receivable, notes and accounts, to one Columbus R. Cummings, to raise means to pay money borrowed of the Union National Bank, and immediately sent their attorney, Knickerbocker, to New York to propose sixty cents on the dollar to their mercantile creditors.

Without disclosing the fact that Libby, the dormant partner, was *a man of large reputed wealth*, that he, with others, had *expressly agreed with Cleaveland that all the debts of the firm should be paid*, and without *frankly admitting that Libby was well known to the defendants below to be a common law partner in that firm and liable as such*, they procured from the plaintiffs below the assignment to Knickerbocker, set out in the (IX) finding, upon the payment of sixty per cent. of their claim; the defendants below, at the same time, as part of the same arrangement, delivering to the plaintiffs their written agreement, in which they "*stipulate and agree not to pay voluntarily to any of their creditors* holding claims in excess of one thousand dollars, to exceed sixty per cent. on the dollar in settlement; providing, however, that the payment of attorneys' fees and court costs *in all cases where suits have been heretofore or may hereafter be commenced* shall not be considered as an evasion or violation of this agreement." What the court found as to the violation of this agreement is fully stated in the (X) finding of the court, set out hereafter.

List of Statutes and Authorities Cited.

Chap. 84, R. S., Ill. on Limited Partnerships:

Section 1. "That hereafter it shall be lawful to form limited partnerships within this State, according to the provisions of this act."

Sec. 4. "The persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain," etc., etc.

Sec. 5. "Such certificate shall be acknowledged by the several persons signing the same before some officer authorized to take the acknowledgment of deeds," etc., etc., etc.

Sec. 6. "The certificate so acknowledged and certified shall be filed in the office of the county clerk of the county in which the principal place of business shall be situated, and shall be recorded at large by the clerk in a book to be kept by him," etc., etc.

Sec. 7. "At the time of filing the original certificate, as before directed, an affidavit of one or more of the general partners shall also be filed in the same office, stating the amount," etc., etc.

Sec. 8. "No such partnership shall be deemed to have been formed until such certificate, acknowledgment and affidavit shall have been filed, as above directed."

2 Vol. Par's Con., 6 Ed., pp. 671–2.
Serviss v. *McDonald*, 107 N. Y. 260, p. 265.
Lindley on Part., marg. p. 300.
Hefter v. *Gahn*, 73 Ill. Rep. 296, 300.
Bump on Composition, pp. 20, 23.
Levring v. *Gale*, 28 Ind. Rep. 486.
Elfelt v. *Snow*, 2 Saw. Cir. Ct. Rep. 94, 106.
Hoare v. *Dawes*, 1 Doug. 372.
Robinson v. *Wilkinson*, 3 Price Rep. 538.
Graham v. *Meyer*, 99 N. Y. 611.
Dambmann v. *Schutling*, 75 N. Y. 55.
Dambmann v. *Schutling*, 85 N. Y. 622, 623.
Carey v. *Barrett*, 4 C. P. D. (1879) 379, 381, 382.

Kingsley v. *Kingsley*, 20 Ill. 205.
Gould on Pleading, Chap. VI., Secs. 48 and 49.
Miller v. *Manice*, 6 Hill, 124.
Wann v. *McNulty*, 2 Gilman, 355.
Bradshaw v. *Combs*, 102 Ill Rep. 428, 433.
1 Greenleaf Evidence, 12 Ed., p. 34, Sec. 284.
Morgan v. *Griffiths*, L. R. 6, Ex. 70.
Lewis v. *Seabury*, 74 N. Y. 409.
Chapin v. *Dobson*, 78 N. Y. 74.
Bates on Partnership, vol. 1, Sec. 504, *et. seq.* and notes; also Secs. 511, 513, 516 and notes.

BRIEF.

I.

The assignment to Knickerbocker was not binding upon the defendants in error; because the plaintiffs in error did not disclose as they ought to have done, what was well known to them, and what was not known to the defendants in error—the financial standing of Libby; his full, unquestioned liability as a common law partner of the firm of Cleaveland, Cummings & Woodruff; and, the express liability which he assumed, upon its dissolution, in the agreement with Cleaveland that all the debts of the firm should be paid and he be indemnified against them.

Libby, one of the defendants below, was reputed to be a man of *large wealth.* He was a *dormant general common law partner*, and not a *special or limited partner*, in the firm of Cleaveland, Cummings & Woodruff. This was true of him not in any mere technical sense, as the other side claim, but substantially; and, as to creditors, to all intents and purposes.

It was well known to him and to all his co-partners (whether known to Knickerbocker, their attorney, or not makes no difference) that no steps had been taken to limit his liability under the statute of Limited Partnerships.

There was no certificate, no acknowledgment, no record filed, and no affidavit, as required by sections 4, 5, 6 and 7, Chap. 84, Revised Statutes of Illinois.

While section 8, in express words, declares "no such" [limited] "partnership shall be deemed to have been formed until such certificate, acknowledgment and affidavit shall have been filed, as above directed."

It was also well known to Libby, and to all the defendants below (whether known to Knickerbocker or not) that they had signed the writing mentioned in the fifth finding, in which, in express terms, they state that Libby *was a member* of the co partnership of Cleaveland, Cummings & Woodruff, and in which they go further, and *jointly agree* with Cleaveland, in consideration of the sale to Libby of his interest for $1,000, that *another firm*, yet to be formed, *shall pay all the debts* of the late firm, and shall save Cleaveland harmless therefrom.

But the counsel on the other side (Brief, p. 13) contend that the agreement delivered to Cleaveland upon the purchase of his interest by Libby creates no liability on the part of Libby, because it says, a new firm was to assume and pay Cleaveland's liability, and that firm was never formed. To quote their own words, the paper has not "the slightest force, for the simple reason that the new firm, upon which the liabilities of the old were to be put, was never formed."

This, as we shall see, is a perfect *non sequitur*.

The formation of such new firm was neither illegal, nor impossible; and, nothing but illegality or impossibility will excuse from the performance of a contract.

For a valuable consideration Libby joined in an agreement with, and thereby bound himself to Cleaveland, that a certain contemplated partnership, about to be formed under the name of "Cummings, Woodruff & Brown," *would assume and pay all the debts* of "Cleaveland, Cummings & Woodruff," and would save Cleaveland harmless therefrom. Such a contract was lawful. It was made for a lawful purpose. If such firm was not formed, and did not pay those debts and save Cleaveland harmless, the contract was broken, and Libby became liable to pay. Nothing less than an act of God making it *impossible* would be a good defense to an action upon it for the breach.

2 Par. Con. 6 Ed., pp. 671-2.

And even *then*, it would be no sufficient defense if that impossibility were among the contingencies which a prudent man should have foreseen, and provided against.

2 Par. Con., p. 672.

Libby, therefore, was not only liable as a general common law partner, but, by express agreement with Cleaveland, he made himself liable to pay *all* the debts of the firm —not only his own share but the *whole* thereof.

It is no answer to say the agreement was in form with Cleaveland, and not with the creditors, and therefore a suit at law upon it must be brought in the name of Cleaveland. Upon that point the authorities are conflicting. But concede, for the sake of argument, that to be so, the creditor, after exhausting his remedy on execution against Cleaveland, could reach that agreement held by Cleaveland, and make Libby liable in equity. The creditor could be subrogated to Cleaveland's right under the contract, and *compel Libby* to pay the debts, and thus indemnify Cleaveland.

There is nothing in the passage quoted from Lindley on Partnership in the brief of the other side (see brief, p. 13) to conflict with this view. True, he says the agreement between the partners is not competent evidence by a creditor to prove in a suit at law the liability of an incoming partner. But Lindley was speaking of the agreement *as evidence;* for, in the next paragraph he says of such an agreement to pay creditors that "an arrangement between the partners is no evidence," (in a suit by the creditor).

The case of *Serviss* v. *McDonald*, 107 N. Y. 260, cited by the other side to sustain their view, upon careful examination, seems rather to sustain our position. It was briefly this: The incoming partner, Lucy McDonald, in writing, agreed to pay one third of the liabilities of the late firm, receive one third of the profits, pay one third the expenses, bear one third of the losses, and furnish one third of the capital. (See p. 264). In a suit by a creditor of the prior firm against her, for the entire demand, the learned court held, "that the defendant's liability must be measured by *this agreement,* and could not exceed *one third* of the debts of the old firm." (P. 265)

It is no where decided that a creditor, having exhausted his legal remedy and failed to collect his debt against the members of the old firm, may not be subrogated to their rights, *in equity,* against any one who has promised to pay the debts of the old firm, and we venture to say no such case can be found.

What, then, was the liability resting upon Libby? It was two-fold. First, as general partner; and, second, as party to an express agreement. Lindley, in his work on partnership, states, with great force, his liability as a common law partner (p. 300, marg.). We adopt his language as part of our argument.

Every member "is liable to the utmost farthing of his property for the debts and engagements of the firm. The law ignoring the firm as anything distinct from the persons composing it treats the debts and engagements of the firm as the debts and engagements of the partners, and holds each partner for them accordingly. Moreover, if judgment is obtained against the firm for a debt owing by it the judgment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners, nor is he under any obligation to levy execution against them ratably, but he may select any one or more of them and levy execution upon him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterward between the partners themselves."

Again; This express agreement of Libby with his retiring partner, even if he had been a special partner (which clearly he was not), made him individually liable to pay all the debts of the firm. The conclusion which follows is: *That as between the plaintiffs in error and their creditors, the assets liable for debts embrace all the property of each partner, including all the assets of Libby, as well as the property used in the firm business.*

DUTY OF DISCLOSURE.

Hence it follows that, when a compromise and composition of undisputed demands of creditors were sought, as in this case, the duty of disclosure required *a full disclosure, not only of the assets of the firm but of the property and assets of each member of the firm, and especially of Libby, the man of large reputed wealth.*

The court was therefore justified in finding that the assignment to Knickerbocker, their attorney, was invalid; because certain facts, *well known to the plaintiffs* in error, and *not known to the defendants* in error, were not disclosed, viz., that Libby was a general common law partner; that, in consideration of the purchase by him of Cleaveland's interest, he had expressly agreed that *all the debts* of the firm should be paid, and Cleaveland indemnified therefrom; and that Libby was reputed to be a man of *large wealth;* which, at this day, means nothing less than that he is a millionaire. Neither of these most important facts was disclosed to the creditors. The omission to disclose either was such a violation of their duty as to avoid the compromise. In this position we are well sustained by the authorities.

In the case of *Hefter* v. *Cahn*, 73 Ill. Rep. 296, the Supreme Court of Illinois, in general terms, state the rule established by all the authorities: "In effecting a composition agreement the policy of the law demands *the utmost good faith on the part of the debtor.* He can not be permitted, by *pretending to be insolvent*, to induce a creditor to accept *one half of a debt in lieu of the whole, when in fact his property is ample to pay the creditor in full.* Good faith requires of the debtor before he shall be permitted to profit by a composition agreement, that he shall *make a full and fair statement of* ~~*the*~~ his *effects.*" This applies to Libby as well as to the defendants named in the firm name.

In *Levring* v. *Gale*, 28 Indiana Rep. 486, the court, speaking of the good faith required of a debtor in composition agreements, says: "It is a rule of law that a matured and liquidated demand can not be satisfied, ordinarily, by a payment in money of a sum less than the amount of the debt." After referring to the case of a composition between debtor and creditor as a familiar exception to that rule, the court go on to say: "This exception is sustained, however, only where the *most scrupulous good faith* has been observed by the debtor in reference to the transaction."

What did the defendants below do, and what ought they to have done?

Instead of sending an attorney to New York to tell their creditors, as they ought to have done, what they all well knew, that *Libby was liable for all* the debts of the firm; that he was a *man of large reputed wealth* and able of his own means to pay them many times over; and that *he had expressly agreed* with Cleaveland that they *should all be paid* and he should be *saved harmless therefrom*, they sent an attorney, ignorant of the facts, to tell them that *the defendants below, including Libby, were insolvent, and unable to pay more than sixty cents on the dollar.*

This assumption on their part of the *attitude of insolvency was itself false and hypocritical.* That, of itself, well warranted the court below in finding that the assignment to Knickerbocker was not binding upon the plaintiffs below, and did not cancel their demand.

Their attorney, instead of telling them what all of them well knew, that Libby was *liable*, said he "was not in possession of information to know whether Libby could make a successful defense or not" against their claims.

The ignorance of their attorney is no excuse for them.

If their attorney did not know; if Libby's liability was a *doubtful, disputed* and *litigated matter* in the mind of the attorney, as he seemed to say, still the *defendants themselves all the time well knew he was liable.* They knew his liability was neither doubtful nor disputed. They knew all the facts which of necessity took all doubt or dispute away. They absolutely knew that not a step had been taken under the law to limit his liability; and, they knew also his *great financial standing.* Whether Knickerbocker, their agent, did or did not know, the defendants well knew both these things, and they *did not disclose this information to their creditors;* and, they well knew the express promise to Cleaveland to pay all the debts, for they all joined in it.

The ignorance or innocence of the agent does not excuse or shield the principal who fails to disclose facts well known to him. If the debtor employs an agent to effect a composition for him it is his duty to inform the agent of the true condition of his affairs, so that he may speak truly if he speaks at all; and if he does not, he can not have the benefit of an agreement obtained by a misrepresentation, although the agent acts in good faith and is ignorant of the truth.

Bump on Composition, 23.

The United States District Judge for Oregon (Deady), in a very able opinion in *Elfelt* v. *Snow* (2 Sawyer, Cir. Ct. Rep. 94, see page 106), lays down the same doctrine in very forcible language. He says: "The case at bar arises between debtor and creditor. The latter is seeking a discharge from his debts upon the payment of forty-five cents on the dollar on the ground that he was unable to pay more." "Snow" (the debtor) "spoke through Jessie" (his agent negotiating the compromise) "and it was his business to inform Jessie of the true condition of his affairs, so that he could speak truly if he spoke at all. If he omitted to do so, either from negligence or design, and the agent made false representations concerning his means which misled the plaintiffs, to their injury, he is responsible for it the same as if he had made them in person. Snow can not be allowed to have the benefit of a composition with his creditors which was confessedly procured by false representations of his agent upon the ground that the agent was ignorant of the truth and made the representations in good faith. If such were the law, dishonest debtors could cheat and deceive their creditors with impunity by means of honest but conveniently ignorant agents." He quotes several elementary authorities to sustain his opinion.

What reasonable man can suppose, if the creditors had been informed that Libby was a millionaire—that he was a general partner beyond a doubt or dispute, and therefore liable to pay them in full; and, above all, if they had been told that he had individually bought out one of the partners and voluntarily had agreed *that all the debts should be paid and he saved harmless therefrom*;—what reasonable man would suppose for a moment the creditors would have agreed to take sixty cents on the dollar in full of their claims? The idea is preposterous and absurd.

It does not change the rule of liability or the duty of disclosure as to these important and controlling facts that one of the plaintiffs said they sold no goods on Libby's credit as a general partner, for it was wholly immaterial whether they knew Libby was a partner at all. Hew as not named in the firm name at all. He was a dormant partner. It is said by Lord Mansfield to be "clear law that *dormant partners are liable when disclosed*."

Hoare v. *Dawes*, 1 Doug. 356.
Robinson v. *Wilkinson*, Price Rep. Vol. 3, p. 538.

Nor does it change or modify the duty of disclosure that one of the plaintiffs said he had no desire to make him lose more than his special capital. If they had known that he was *fully liable*, that he was *a man of large wealth*, and that he *had expressly agreed with Cleaveland that all their creditors should be paid in full*, it would have materially changed their view of the situation. It would violate every principle which governs mankind in business if, after being so informed, they did *not* both *desire* and *insist* upon *payment in full*.

But the learned counsel on the other side contend that a passage quoted by them (see page 15 of their brief) from the opinion of the court in *Graham* v. *Meyer*, 99 N. Y. 611, is "an exact statement of the rule of action by which men are guided in negotiating a compromise." This is the substance of the rule which they contend for: "The defendant was not bound to make any disclosure of his financial condition. He was not asked to make any. He made no misrepresentations, and did nothing to mislead Graham or prevent him from inquiring, or to throw him off his guard. They negotiated at arm's length. The defendant was in no trust or confidential relation with him."

When we look into that case of *Graham* v. *Meyer* we are struck at once with the all important fact that it was not the compromise of an *undisputed* claim. It was a compromise of a long litigated and disputed claim. Graham had recovered a judgment against Meyer for over $240,000. The next day Meyer made an assignment preferring all his other creditors before Graham, and took steps to appeal from and reverse the judgment. Meanwhile a settlement was made and the judgment released for $109,000. This was a clear case of the settlement of dispute and litigation. It was a case of war at arm's length. It was a settlement in full by the payment of about one third of the claim. Upon suit brought to set aside this compromise, the court below dismissed the complaint, and held that a compromise made *of such a dispute*, if the debtor made no misrepresentations, and did nothing to mislead or to prevent inquiry, or to throw his adversary off his guard, was valid. Upon appeal the Court of Appeals affirmed the judgment. In delivering their opinion upon *such* a case as that the court used the language quoted in the brief of the plaintiffs in error.

In that case, however, the court refer to the case of *Dambmann* v. *Schutling*, 75 N. Y. 55, in which there was a compromise of an undisputed claim drawn in question. Schutling, in embarrassed circumstances, arranged with his creditors to borrow $100,000 to meet pressing debts, to be repaid *when he became able.* Of this sum Dambmann loaned $10,000.

In March, 1867, having paid all the claims except for this money loaned, at his request the creditors, by an unsealed instrument, in consideration of one dollar, agreed to discharge the defendant "from the *legal payment* of the money loaned," he "giving his *moral obligation* to refund the money in whole or in part, as his means would allow, in future."

This instrument not being a legal release, the defendant asked the plaintiff if he would sign a *legal release* upon payment of $5,000. The plaintiff, without making *any inquiries*, agreed to and did so.

Upon action brought to set aside the release and recover the balance of the loan, the Court of Appeals affirmed the decision of the trial court dismissing the complaint, and held that the defendant owed no "duty of disclosure" *as to his financial ability*."

This ruling of the court, however, was much criticised, and when the case came on again before it (88 N. Y. 622) the learned court stated more precisely and clearly the ground upon which the defendant in that case was relieved from the "*duty of disclosure*." The court say (p. 623): "We held in this case upon a previous appeal, and upon a state of facts which so far as this question is concerned remains unchanged, that the defendant owed no duty of disclosure. Our ruling in that respect has been criticised with an ability which has led to serious reflection, but which has not changed our conclusion. It would be doubtful, and we *should be inclined to modify it, but for one controlling and peculiar fact.* The creditors had already agreed to leave the *question of payment to the conscience of the debtor, both as to time and amount.* While this agreement was not legally binding, its existence affected the duty of disclosure. The silence was not fraudulent when both parties understood that explanations were immaterial in view of the existing understanding that the *debtor alone was to determine, guided solely by his own knowledge and conscience, when* and *how* he should pay.''

The rule laid down by the Supreme Court of Illinois, as well as all other authorities, that good faith requires *a full and fair disclosure* of the financial condition of parties who ask their creditors to accept a part of the debt in lieu of the whole, when in fact their property is ample to pay the creditor in full, is not shaken or modified by any of the cases referred to by the counsel on the other side. The rule of the utmost good faith—*uberrima fide*—prevails.

The debtor, in seeking to affect a composition, "makes an appeal to the liberality of his creditors" * * * "and is bound by every consideration of justice and morality to deal fairly with them." * * * "*He is a quasi trustee for them and under an obligation to apply all his property faithfully to pay his debts.*" * * * "*He alone has full knowledge of the condition of all his affairs*" * * * "*for the negotiation is conducted while he retains control of his property.* If the debtor therefore misrepresents or suppresses any material fact in the statement of his affairs, either as to the *amount* of his property or the amount of his indebtedness, the composition agreement is void."

Bump on Compositions, p. 20.

It comes very near to the golden rule of do unto others as ye would they should do unto you. It is the rule of the highest ethics, and of the most conscientious obligation; and why? Because when the debtor asks, not for justice but for *mercy;* when he asks his creditor to *forgive* his debts, he must come, not only with no positive falsehood in his mouth, and with no intentional false suppression of the truth, but he must make a full and fair disclosure, *because he knows his own financial condition, and his creditor does not know it.* He should tell the truth, the whole truth, and nothing but the truth upon that subject. When appealing to the liberality, to the heart, of his creditor, he should come with no guile in his own heart. He should speak without reserve as to *his means of payment,* with no *arrière pensée.* It is not true that when the debtor sues for forgiveness of the debt, or a considerable part of it, he is dealing with his creditor at arm's length. So far from that, he seeks to come into his very bosom. He appeals to his generosity, to the noblest sentiment of the human heart. While appealing to that, he asks selfishness and suspicion to be laid aside.

The rule of *caveat emptor,* of bargain and sale, does not apply to such a case. Least of all should the millionaire, when he falsely assumes the role of insolvency, and in the name of mercy asks his creditor to forgive—to give up to him what in justice he has no right to have, and which only greedy and cringing avarice would consent to take—least of all, I repeat, should he be allowed to plead the rule of *caveat emptor* in his defense.

Libby's attorney should have been instructed to tell his creditors the truth. He should have been told to say: "Libby is a man of large reputed wealth. He was a limited partner in the firm of Cleaveland, Cummings & Shelley, having put in $50,000. But when Shelley went out and Woodruff came into the new partnership, Libby, though he intended to be a limited partner in the new firm, took no steps to limit his liability." He should have admitted that he was legally liable, as a common law partner, to pay all the debts of Cleaveland, Cummings & Woodruff; that he had promised Cleaveland to pay them, and that he was able to pay them in full. But he might have said, he had lost his special capital of $50,000 in the old firm, and by mere neglect had taken no steps to limit his liability in the new one. Then, if, in consideration of that, and as a favor to him personally, the creditors, knowing these facts, had agreed to compromise their demands at sixty cents on the dollar, the assignment to Knickerbocker might have been held to be valid and binding upon them.

But he wholly failed to disclose those material facts. The assignment to Knickerbocker is invalid, and the court below was right in treating it as such.

II.

But even if the assignment was binding, there was a clear, substantial and *intentional* violation of the express condition upon which it was given, viz: by the payment by the plaintiff in error to Vietor & Achelis of eighty per cent. of their demand.

This was expressly found by the court; we read the tenth finding as follows: (Rec. p. 42.)

"X. That in April, 1884, all the mercantile debts of Cleaveland, Cummings & Woodruff had been settled at sixty cents and released, except about $88,000; that the firm of Vietor & Achelis had not released their claim, but had brought a suit by attachment thereon against James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff, and Washington Libbey, which was about to be tried; that the attorney of Cleaveland, Cummings & Woodruff paid to Vietor & Achelis sixty cents on the dollar of their claim, who thereupon released their said claim; but at the same time said attorney of Cleaveland, Cummings & Woodruff gave his check (which was afterward paid) to the attorneys of Vietor & Achelis for twenty-five per cent. on the dollar of said claim, and said attorneys remitted twenty of said twenty-five per cent. to Vietor & Achelis; that this payment was a cover under which Vietor & Achelis were to and did receive on their claim more than sixty per cent., and such payment was made after Vietor & Achelis had refused to take sixty per cent. by agreement between the attorneys of Cleaveland, Cummings & Woodruff and Vietor & Achelis that Vietor & Achelis should receive eighty per cent."

The court found not only that the essential condition of the compromise upon which the plaintiffs agreed to accept sixty per cent. in full, viz.: That the defendants would not *voluntarily pay any other creditor to exceed sixty per cent. on the dollar* was not only clearly violated, but that it was intentionally violated, or even *clandestinely violated.* The court expressly finds it was done under *cover* or pretext of paying attorneys' fees, while the payment was really made in pursuance of an agreement with Vietor & Achilis to pay them eighty per cent. of their demand. This was a clear violation and evasion of the condition.

But the counsel on the other side contend it was no violation, because they say as a suit had been commenced, therefore the payment was not *voluntary.*

In answer; we appeal to the language of the condition. It says, they "agree not to pay voluntarily to *any of their creditors,* holding claims in excess of one thousand dollars, to exceed sixty per cent. on the dollar in settlement;

provided, however, that the payment of attorneys' fees and court costs, in all cases *where suits have been heretofore, or may hereafter be commenced,* shall not be considered an evasion or violation of this agreement."

The plain and obvious meaning of this language is to include in the condition *all their creditors,* and whether their claims *are in suit or not.* If any creditor has heretofore, or may hereafter bring suit, the attorneys' fees and court costs may be paid without breaking the condition of the compromise. But any agreement to pay more than sixty per cent. of the principal of the debt, whether the *claim is sued or not sued,* would violate the condition. It is impossible to believe the parties intended to exclude from the operation of the condition all claims where legal process should be taken to enforce them, because these very claims are embraced in the words of the condition. If such had been their intention—if they intended to say that if legal steps were taken to collect the claim the settlement of such claim would *not be a voluntary* payment, within the meaning of the condition, there was no necessity for the proviso about paying attorneys' fees and court costs at all.

The proviso was necessary simply because the condition clearly embraced not only claims where no suit was pending, but because it embraced all cases where suit had been or might be brought to enforce the claim. In a word it included *all creditors,* and all claims, whether in suit or not, for more than $1,000.

The instrument construes itself. The clear intention of the parties was to embrace in the condition *all* claims of *all* creditors for more than $1,000, whether they sought to enforce them by legal process or not. It was not contemplated that the fact of a suit brought was to be regarded as such compulsion as to make the settlement *involuntary*. If it was to have that construction why mention those cases at all? The construction contended for on the other side makes the whole proviso *meaningless and absurd*.

The counsel on the other side (Brief, p. 18) say the plaintiffs in error adduced evidence *tending* "to show that no payment was made to either of the mercantile creditors by preference, or with a view to discriminate between one of said creditors and another."

It is true in the Bill of Exceptions the judge certifies they gave some evidence tending to show that, but, unfortunately for the plaintiffs in error, in his tenth finding he finds *the fact to be otherwise* (Record, p. 42). He finds that under cover of attorneys' fees, they *agreed to pay*, and in violation of the condition, *did pay* Vietor & Achilis eighty per cent. of their claim."

The counsel on the other side also contend that this precise question, viz. whether the payment was voluntary or not, was determined by Lord Coleridge in the case of *Carey* v. *Barrett*, 4 C. P. D. (1879), p. 379. We have looked carefully into that case. The composition agreement in that case was in these words:

"In consideration of ten shillings in the pound on our respective debts, set opposite our respective names, we hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practiced by said William Barrett, the whole of the creditors receiving not exceeding a like sum in discharge of their debts." (See p. 381.)

Willis, counsel on one side, contended that the agreement embraced all creditors, and that "'the whole of the creditors' could not mean *only those who had consented*" (by signing the agreement) "to take 10s. in the pound, because *their debts were satisfied.*"

Matthews, on the other side, contended, "the agreement applies to the *signing creditors only.*"

Lord Coleridge (see p. 382) said: "The real question is whether the meaning of the document is that *no* creditor is to receive more than 10s in the pound, whether party to the agreement or not. I agree that if that were the true interpretation *the voluntary payment to any of them of more than the stipulated sum would be a fair ground for impeaching the agreement.*"

Again he said: "If the stipulation at the end means *all* the creditors we deed not discuss it. I think, fairly read, it means all *us signatories.*" "I can not think that the construction sought to be put upon the agreement by Mr. Willis is a reasonable one."

He held, substantially, that the instrument referred only to those creditors *who signed it.* But if, as in the case at bar, *all* creditors were embraced, then the "payment to any one of them of more than the stipulated sum would impeach the agreement."

Again: The counsel on the other side say the agreement to pay Vietor & Achilis was made *after* the compromise with the plaintiffs below, and without any previous understanding. They quote a sentence from Lord Coleridge's opinion, "that a payment in excess made afterward will not avoid the composition, unless made in pursuance of a previous understanding." But that is where the composition is sought to be impeached on the ground of *fraud.* It does not apply at all to a case where there is an express *condition in writing* not to pay more to any creditor. The language of the condition expressly looks to future payments; and as *all* creditors were embraced in it, whether they had commenced or should thereafter commence suits, the payment in excess was a clear breach of the condition. It was thereby defeated. The right of action upon the original demand was at once revived.

We agree with the other side (Brief, p. 28) that "The agreement adduced in evidence contains no provision that the defendants below would pay to the claimants as much as they paid to any others." The condition was not if they should pay any other creditor more, then, in that case they would pay the plaintiffs below an equal per centage of their claim. The condition was absolute, that they would *pay no creditor having a claim over $1,000 more than sixty per cent.* If they did, the condition of the compromise was broken. The court expressly found they did so, and the unpaid balance of the original demand was thereby revived in full force.

III.

The assignment to Knickerbocker, who was the attorney of the defendants below, and who paid their money as the consideration, made him a *trustee* for them in equity. In form, it is true, the legal title passed to Knickerbocker, not as trustee or attorney, but to him individually under the assignment; but the equitable title or beneficial interest was really in trust for the plaintiffs in error and that trust rested in parol. The condition attached to that equity in the plaintiffs in error appears by the paper signed, not by Knickerbocker—nor by the defendants in error—but by Cleaveland, Cummings & Woodruff themselves, the plaintiffs in error who were the real beneficiaries.

But it is insisted on the other side that the paper executed by them does not attach as a condition, because the assignment to Knickerbocker was in form under seal, and the paper signed by Cleaveland, Cummings & Woodruff was not under seal, though parts of the same transaction and agreement. The fact is, the assignment to Knickerbocker was not signed by the defendants in error, but by Mr. Smith, *their agent.* There is a printed seal opposite their names and opposite to his as agent.

We answer *first;* no seal was necessary to the assignment; and, *second;* there is no proof to show that the agent had any *authority under seal to execute an assignment for his principals under seal.* The seal, therefore, was a nullity—mere surplusage—and may be treated as such.

Besides, even if it were properly under seal, we answer, *thirdly;* the paper signed by Cleaveland, Cummings & Woodruff, although not under seal, became just as much a binding condition to their equitable interest as if it had been sealed, for it was the contract and the only contract between the parties to this suit—the very condition and essence of the compromise.

There was no instrument under seal from Knickerbocker, nor from the plaintiffs below, to the defendants below. Their equity under the assignment is not stated upon its face. It arises from facts *outside the sealed instrument.* It grows out of the fact that Knickerbocker *was their attorney,* and that *their money paid for the assignment.* The *trust,* in fact rested in matter *in pais,* between the attorney and his principal. It therefore follows that a fundamental condition to their equity could be declared by them in a writing without seal, which was the very condition upon which they took any equity at all. Had the assignment under seal been executed by the plaintiffs directly to the defendants, and had they taken from the defendants the agreement containing the condition without a seal as part of the same transaction, then, perhaps, there might be a chance to discuss the question raised by the other side, viz.: whether the agreement without seal could vary or modify or condition a sealed instrument. But the simple answer to this objection is, the question does not arise; for *such is not the fact.*

It was the equity of the defendants growing out of facts resting in parol outside of the sealed instrument to which the agreement in writing, signed by the defendants, was made the condition. Therefore the case of *Kingsley* v. *Kingsley,* 20 Ill. 205, has no application at all to the case at bar.

We have carefully examined that case. While we do not deny the rule of law there laid down, we feel confident it does not affect the position taken by us in the case at bar.

That was a case where one person indebted to another made a compromise of a single debt. A release under seal was executed and delivered. At the same time a verbal agreement was made that the notes given for the release should be signed by a third person as surety. They were not signed by him, and the court held that, nevertheless, the release would be operative, and that the remedy ~~of the release~~, *in the absence of fraud,* would be by suit on the contract to secure the note.

While in the case at bar there was an attempt to make a general compromise, and, as we have already shown, it was the duty of the party seeking the compromise to use the *utmost good faith,* and to pay no creditor more than the amount agreed on in general for the compromise. Whatever the form of the compromise, whether by instrument under seal or by parol, either in writing or verbally, and whether the condition upon which it was to be performed was under seal or was by parol, if any of the essential conditions were violated the compromise itself was avoided, and the original right of action arose again. The mere formality of the methods by which the compromise was agreed upon would be immaterial.

We claim that even if the compromise had been verbal only, and its condition was not to pay more than sixty cents to any other creditor, though there had been no writing in the matter whatsoever, except the assignment, upon the other findings in this case the compromise would be unfair, and the defendants in error would have a right of action upon their original demand.

Again, where a transaction is not required by law to be in writing, it is not the law that the whole contract must be reduced to writing because some of it is. Where the parties do not reduce their entire contract to writing it is competent to show the whole contract, as well what is not in writing as what may be in writing; as well what is under seal as what is not under seal.

In *Bradshaw* v. *Combs*, 102 Ill. 441, we read from page 433; the court says: "Where parties reduce their agreement to writing they can not be allowed to vary its terms by parol; but where it is evident that the agreement is not reduced to writing, but only a part of it, and where that part reduced to writing is merely a partial execution of a part of an entire agreement between the parties, the whole agreement may be proven."

Greenleaf on Evidence, 12 Ed., p. 321, Chap. 15, Sec. 284 *a*.

This doctrine is well recognized, both in England and in this country.

Morgan v. *Griffiths*, L. R. 6, Ex. 70.
Lewis v. *Seabury*, 74 N. Y. 409.
Chapin v. *Dobson*, 78 N. Y. 74.

Besides, this distinction between *sealed* and *unsealed* writings as evidence has almost disappeared, and ought to wholly disappear in the progress of modern education, modern legislation and modern decisions.

It never had any foundation in reason. The old Saxon custom was for those who could write to sign their names, *without seal*, and, for those who could not, to affix *the sign of the cross*. This inability to write, and thereupon making a cross in its stead, was honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters. For the same insurmountable reason, inability to write, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of *sealing only, without writing their names*. At the Conquest, the Norman lords took their own fashions with them into England, and introduced *waxen seals only*, instead of the English method of writing their names or signing with the sign of the cross.

II Book, Blackstone, 306.

Because of the *inability to write their names*, the affixing of the cross by the early Saxons, and the sealing with wax by the Normans, was used as a mode to identify, and to show their assent to what was written above the cross, or above the seal. Neither cross nor seal had any other meaning than as evidence of assent to what was written above them.

When a party can write, his name signed to an instrument is the best of all evidence of his assent.

As education becomes more common, the reason for seals upon written agreements disappears. Their importance grows less just in proportion as popular intelligence extends.

Private seals are already abolished in Alabama, Arkansas, California, Colorado, Dakota, Indiana, Iowa, Kansas, Louisiana, Michigan, Nebraska, Ohio and Texas—in thirteen States in the Union. While not abolished in the States of Connecticut, Delaware, Florida, Illinois, Maryland, Minnesota, Missouri, Nevada, Oregon, Pennsylvania, Virginia, West Virginia and Wisconsin, all the seal required in these thirteen other States is a scroll. It is only in Kentucky, Maine, Massachusetts, New Hampshire, New Jersey, New York, North and South Carolina, Rhode Island and Vermont, ten other States, that a seal is still required. Seven of the old thirteen States, with Vermont, Maine and Kentucky, still cling to the old Norman idea of a seal—*minus wax*. A wafer will now do in all these States in the place of wax.

Let us look into the reason of this thing for a moment, as a mere question of evidence. Suppose two parties come to an agreement. The one states what he will do upon one piece of paper, signs his name to it, and, at the end, makes a flourish with his pen in the shape of a scrawl. The other party to the same transaction, upon another piece of paper, states his part of the contract in writing, signs his name in a plain legible hand, but makes no *scrawl at the end of it.* The question is, shall both papers, executed and delivered at the same time, which together state the agreement on both sides as parts of the same transaction, the very ideas upon which their minds meet, be read together as evidence to learn the true meaning of the contract between the parties? Or must we read one and leave out the other?

Grave and reverend judges in this year of our Lord 1889, near the close of the nineteenth century, are asked by the other side to reverse the judgment of the court below because it refused to exclude *the written condition,* and the *very condition* upon which the plaintiffs below consented to compromise their demand, simply because the defendants below omitted to place the *scrawl,* the old badge of ignorance, after their names.

The proposition seems too absurd for serious consideration. Both papers are written in plain English. Both are but parts of the same transaction, as much so as if both were written on the same paper; as much so as if a receipted bill of sale were given to one party in consideration of the note of another, for the price of the goods.

In the leading case of *Slackpole* v. *Arnold,* 11 Mass. 30, 31 Parker, J., states with great clearness the reason why parol evidence, which is oral, unwritten evidence, can not be admitted to explain away contracts in writing; whether sealed or unsealed it makes no difference. "It is not because a seal is put to the contract that it shall not be explained away, varied or rendered ineffective; but *because the contract itself* is plainly and intelligently stated in the language of the parties, and is the best possible evidence of the intent and meaning of those who are bound by the contract, and of those who are to receive the benefit of it."

Greenleaf, Sec. 282, Vol. 1, says: "It is apparent that the *rule excludes only parol*" (which means oral) "*evidence of the language* of the parties contradicting, varying or adding to that which is contained in the *written* instrument."

The rule does not exclude *written* language to explain *written* language in the same transaction. It would be a monstrous injustice to exclude the *written language* signed by the party at the same time as part of the same contract, and which was written and signed expressly as the *consideration and condition of the contract* of compromise.

The reason for excluding oral evidence to vary written agreements is well given by Lord Coke in the Countess of Rutland's case (5 Rep., 26 *a*), and is as follows, viz: "It would be inconvenient that matters in writing made by advice and consideration, and which finally import certain truth of the agreement of the parties should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers, and all others in such cases, if such nude averments against matter *in writing* should be admitted."

It is the *written* matter which mere *oral* words, *mere sound*, which may easily be forgotten, ought not to explain.

We concede that all oral conversation which preceded the execution of the written instrument is excluded by this rule, and ought to be. But both upon reason and upon authority, there is no ground for excluding the writing executed by the party as part of the transaction.

There is no uncertain testimony of slippery memory in the writing. It speaks in plain language to-day just what it did when it was executed, and will speak the same language so long as it exists. It is no *parol explanation of a written contract*. It is part of the written contract itself. The court below was right in admitting it in evidence as the agreement executed by the plaintiffs in error, as the condition of the compromise with them.

IV.

As to the Pleadings.

In *indebitatus assumpsit* the plea of the general issue controls as to all defenses on the merits. Every fact may be put in evidence by the defendants to show that at the time of pleading the defendants *were not indebted* to the plaintiffs; and every fact may be put in evidence by the plaintiffs to show that the defendants *were at that time indebted* to the plaintiffs. The indebtedness, the liability, is the very gist of the action.

Gould, in his work on pleading (Chap. VI., Secs. 48 and 49), states more clearly than any other writer the reason for this well known and peculiar rule in *indebitatus assumpsit.* "In that action, as the promise laid in the declaration is a mere *inference or conclusion of law* from the *debt or legal liability* alleged as its consideration (which inference the law *continually* raises while the legal liability remains and no longer) it results that whatever disproves a *subsisting* debt or legal *liability* at the *time* of the *plea* pleaded disproves the alleged *promise.* And the existence of the *debt*, etc., at the time of pleading may be disproved by showing either that it *never existed,* or that it has been by any means *extinguished* before that time." (Chap VI, Sec. 48.)

The general issue in this action simply means that the defendant "at the *time of the pleading is not* indebted to the plaintiff, or not in law *liable to the demand* made in the declaration." (Gould's pleading, Chap. VI, Sec. 49.)

The rule is well stated also by Chancellor Walworth in the N. Y. Court of Appeals, *Miller* v. *Manice,* 6 Hill, p. 124. See *Wann* v. *McNulty,* 2 Gilman 355; 1 Chitty, marg., p. 278, where Chitty says, a release may be "given in evidence under the plea of *non-assumpsit* although there were also a special plea in which the ground of defense *might not have been correctly stated.*"

If, disregarding a special plea, such a defense can be given under the general issue, *a fortiori,* whatever avoids go to New York for the purpose of telling any more than was necessary to secure the assent of creditors. His main object was to get a compromise as best he could. We do not claim that he intentionally concealed anything, but we do claim, as was found by the court, that the plaintiffs in error themselves, concealed from their attorney the very material fact that Libby, who was reputed to be a man of great wealth, was a common law partner in the house; and, that Libby had expressly agreed with Cleaveland that all the debts should be paid.

3d. Counsel for the plaintiffs in error argue that it was not material that it should be disclosed to the defendants in error that Libby had signed the instrument of dissolution referred to in the fifth finding, or that Knickerbocker failed to make any statement as to Libby's financial ability to pay the debts.

As to the paper signed by Libby, they say that no advantage could have been taken of it by the defendants in error, because an agreement of this kind is only binding between the partners themselves, and is not such an agreement as could be sued upon by creditors.

This question we have already discussed at some length, but it is not by any means the settled law that where a contract of this kind is made, the promisor or promisors may not be directly sued in a common law suit by a creditor of the old firm. That such a suit may be maintained has been held by many respectable courts. See the whole subject fully discussed in Bates on Law Partnership, Vol. 1, Sec. 504, *et seq.*, and cases cited in Note 2; also Sec. 510, and notes; also Sec. 511 and notes; also Sec. 513 and Sec. 516.

The doctrine seems to be based upon the foundation that a new promise is made upon a sufficient consideration. In this case, for instance, Libby and the others, upon the consideration of having Cleaveland turn over to him all the assets of the firm, agreed that the new firm should pay the debts of the old firm, and they took the assets with which to pay them. That they were insufficient is immaterial. That appellants did not form a new firm is immaterial. It was a valid contract, and, as we say, there are many respectable authorities holding that Libby and the others could have been sued by the creditors of the old firm.

However, even if this were not so, we maintain that in case a judgment should be obtained against the old firm and it should appear that Libby was only a limited partner, upon a creditors' bill, and receiver duly appointed, the promise of Libby to pay the debts of the old firm in the manner stated in the contract would be an asset in the hands of the receiver, which could be collected and applied to the benefit of the judgment creditors.

This would follow even upon the assumption that Mr. Libby was a limited partner; but inasmuch as the court found—and as to the correctness of the finding there can be no doubt—that Mr. Libby was a general partner, any argument as to whether he could have been held upon this contract upon the assumption that he was only a limited partner, is unnecessary.

The fact is, that this paper was introduced in evidence to show that Mr. Libby had himself signed a paper which proved conclusively that he was a general partner in this house. That was one of the issues made in the case by the plea in abatement; and, under that plea it was material evidence.

In fact, it was conclusive evidence to show that Mr. Libby was a general partner in the house. That paper recites that a partnership existed. It had been pleaded by Libby that he was not a partner. This document was introduced in evidence for the purpose of showing that he was; and, the concealment of material fact on the part of the plaintiffs in error consisted in not disclosing to their creditors what they could not help knowing to be true, because they all signed the paper which declared it; that Mr. Libby was, beyond all peradventure, a general partner in the house, and liable to the utmost farthing for its debts. That they did not communicate this fact to Mr. Knickerbocker, among other things, constitutes a breach of good faith in this case; and, we submit, it is conclusive evidence on that point.

We therefore say, that Libby was unquestionably liable as a general partner; that this fact was known to the plaintiffs in error when Mr. Knickerbocker went to New York, because the paper was executed on the 30th of October, and signed by all the plaintiffs in error, while the failure did not occur until the 14th of November, and was a material fact to be disclosed to the creditors upon suing for a compromise.

If we assume that Libby was a limited partner, a question which Mr. Knickerbocker refused to decide for the creditors, it was also very important to the defendants in error that the contents of this paper should have been known to them; because, if Libby was only a limited partner, they might, as we claim, have been able to have sued him upon that contract; or if the court should consider that the weight of authority is not with us in this position, we repeat such contract could have been reached by a creditors' bill and receiver thereon, and made available to the creditors, as an asset of Cleaveland.

4th. As to whether the plaintiffs in error had broken their alleged agreement not to pay voluntarily more than sixty cents on the dollar, we have already fully discussed that question.

5th. The plaintiffs in error claim that even if the defendants in error were entitled to a judgment, such judgment should have been not to exceed twenty cents on the dollar of the claim instead of forty cents, and in support of this position they urge that the assignment was an instrument under seal, and that the contemporaneous agreement —which the findings show to be a part of the same transaction—by which the plaintiffs in error agreed not to pay anybody any more, being by parol (*i. e.*, a writing not under seal), " it can not be availed of as a part of, or exception to, or a condition of, the assignment."

Singularly enough the plaintiffs in error here treat this instrument as a *release*, while immediately afterward they treat it as an *assignment;* treating it as one or the other, as may best suit the exigencies of their argument.

In reply to this we say, first, the instrument is not really an instrument under seal, and is of no higher solemnity than the other contemporaneous writing constituting a part of the same transaction. We repeat:

It was not necessary to have this assignment under seal. It was not a release in form; it was an assignment of claim. It was the way that the plaintiffs in error chose to make their settlement. It was not signed by the defendants in error. Even if it had purported to be signed by the defendants in error, it would not be valid as an instrument under seal, unless the partner signing it was duly authorized, under seal, to sign. Now, being signed by the *agent* of the defendants in error, the seal is mere surplusage, unless it appears that he was duly authorized, by an instrument under seal, to sign.

It is a familiar principle of law that no person can, as agent for another, bind that other under seal, unless he himself is authorized to do so by an instrument under seal. Consequently, this assignment to Knickerbocker, being simply signed by the agent of the defendants in error, who was not himself authorized under seal, has no higher solemnity than a written agreement by parol, and the sealing is mere surplusage.

As fully appears, and as expressly found by the court (Rec. p. 21), these papers constituted a single transaction. The parties had agreed to make a compromise at sixty cents on the dollar, provided plaintiffs in error would pay no other creditor more than sixty cents on the dollar, and *after such understanding was had* they undertook to put it in writing, and did it in the form which appears before the court. In all probability, Mr. Knickerbocker having printed forms containing printed seals, the agent of the defendants in error signed that paper, not dreaming that he was making what is called a sealed instrument, and *as the condition of his signing it, required from them at the same time* the other writing in evidence, which had no seal.

The whole theory of the case was, that material facts which plaintiffs in error were bound to disclose were concealed from the defendants in error when they agreed to make this compromise; that the compromise was on the express condition that the plaintiffs in error would not pay anybody any more than they did the defendants in error; that plaintiffs in error had intentionally violated this express condition upon which the settlement was made; that the writings, taken together, were the best evidence of what was agreed to; and, that because of the fraudulent concealment from them of material facts, and of the violation of the condition under which the compromise was made, the original cause of action revived, and they had a right to bring suit upon it, and to treat the assignment to Knickerbocker as of no effect between them.

The counsel for the plaintiffs in error further contend that the title to the notes and the account stated passed by the assignment to Knickerbocker, and that, therefore, the defendants in error could not sue upon the original demand so long as that assignment remained unrescinded.

As before stated, the defendants in error claim that the assignment was void for the reasons above stated; that it was in equity simply an assignment to the plaintiffs in error (themselves) though in form to their agent and attorney, Mr. Knickerbocker. It was admitted on all sides, and it appears in many places in the record, that they were the beneficiaries—that their money paid for it, and, therefore, it could. and should, be treated as found by the court, as a nullity.

As to the SPECIAL PLEADINGS, we repeat:

All the issues in this suit were clearly triable under the common counts and the general issue, excepting only the question of misjoinder.

The defendants below pleaded the general issue, and three special pleas, namely, (1) plea in abatement, denying joint liability; (2) assignment to Knickerbocker, and (3) accord and satisfaction; all of which pleas, excepting the plea in abatement, amounted simply to the general issue.

[See Gould on Pleadings, 4th Ed., Chap. 6, Part 1, Secs. 47 to 53, where it is shown that the only special pleas required in assumpsit are the statute of limitations, tender, set-off and bankruptcy.]